**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ORDINARY ORIGINAL CIVIL JURISDICTION**
**NOTICE OF MOTION NO.1648 OF 2007**
**IN**
**SUIT NO.1253 OF 2007**

Zee Entertainment Enterprises Ltd. ..Plaintiff
V/s.
Mr.Gajendra Singh & Ors. ..Defendants

Mr.Janak Dwarkadas, Senior Counsel with Mr.Rahul Chitnis with Mr.Ankit Lohia and Mr. Ranjit Shetty i/b. PDS Legal for the Plaintiff.

Dr.Veerendra Tulzapurkar, Senior Counse with Mr.Amit Jamsandekar with Mr. Darius Dalal with Ms. Hemlata Marathe with Ms. Rashmi Thakur i/b. Jehangir Gulabbhai & Bilmoria & Daruwalla for Defendant No.1.

Mr.Ravi Kadam, Advocate General with Mr.Virag Tulzapurkar, Senior Counsel with Mr. Sanjay V. Kadam with Mr. Vishal Kanade with Ms. Shobha Khavnekar i/b.M/s. Kadam & Co., for Defendant No.3.

**CORAM : S. J. VAZIFDAR, J.**
**DATE OF RESERVING THE JUDGMENT : 23rd AUGUST, 2007**

**DATE OF PRONOUNCEMENT : 8TH OCTOBER, 2007**

**ORAL JUDGMENT :**

1. Defendant No.2 is one Ms.Karuna Raju Samtani and Defendant No.3 is Star (India) Limited.

2. The suit is filed for a perpetual injunction restraining the Defendants from infringing the Plaintiff's copyright in the literary work and cinematograph film embodying the television game show "Titan Antakshari" being broadcast on its television channel "Zee" since September, 1993 inter-alia by Defendant No.3 broadcasting the television game show "Antakshari – The Great Challenge". The Plaintiff has also sought an order restraining the Defendants from making and broadcasting the television game show "Antakshari – The Great Challenge" and/or using the content and/or presentation and/or the word "Antakshari" in relation to any television game show so as to pass off such show as being a television game show associated with and/or authorized by and/or having any connection with the Plaintiff's game show "Titan Antakshari". Finally the Plaintiff has sought damages and an order for delivery up and destruction of the infringing material.

**The Plaintiff's case :**

3. The Plaintiff claims to be one of India's largest entertainment companies with its operations spread across several

countries in the world engaged inter-alia in content and broadcasting including film production and distribution consisting of production, activation and distribution of films and programmes and aggregation of TV software and syndication, MSO Operations, distribution of satellite channels and internet over cable. The Plaintiff claims to be well-known throughout the country and in large parts of the world.

Defendant No.2 carries on business of production of programmes and serials for television channels. Defendant No.3 carries on inter-alia similar business as that of the Plaintiff.

4. With effect from 23.7.1992, Defendant No.1 was employed by the Plaintiff under a contract of service on the terms and conditions stipulated in an appointment letter dated 22.6.1994. Though Defendant No.1 is designated therein as a “Consultant”, his engagement with the Plaintiff was under a contract of service and not a contract for service. Thereafter, by a letter dated 1.4.1999, the Plaintiff appointed Defendant No.1 as Programmer Director on the terms and conditions stipulated therein.

5. There is no dispute between the parties that with effect from 1.4.1999, Defendant No.1 was engaged by the Plaintiff under a

contract of service. The dispute between the parties is whether between 23.7.1992 and 1.4.1999, Defendant No.1 was engaged by the Plaintiff under a contract of service or whether his engagement constituted a contract for service.

According to the Plaintiff, Defendant No.1 was under a contract of service with the Plaintiff since inception. According to the Defendants, the engagement by the Plaintiff of Defendant No.1 constituted a contract for service from inception till 1.4.1999.

6. During the course of his employment with the Plaintiff, Defendant No.1 in consultation with other senior employees and the Plaintiff's programming team originated the format of a television game show titled `Antakshari' and reduced the same to writing in the form of a concept note. The show was to be a departure from the traditional Antakshari game; the concept note is a literary work within the meaning of the Copyright Act, 1957 and the Plaintiff had and has the exclusive right to reproduce the same and to issue copies of the works to the public.

7. The concept note was converted into a game show and filmed on betacam cassettes which were shown to various sponsors .

In September, 1993, the programme commenced on the Plaintiff's TV channel "Zee TV" and was known as "Close Up Antakshari" as Hindustan Lever Limited had sponsored the same for its toothpaste Close Up. The sponsorship continued upto 2002 with only a four month break in between. Thereafter the show was known as "Sansui Antakshari" in view of the new sponsor. The telecast of the programme under the sponsorship of Sansui continued till about 17.6.2005 on the Plaintiff's channel. Thereafter with effect from 5.1.2007, the Plaintiff restarted the TV game show as "Titan Antakshari" and the same continues as such to date.

8. The Plaintiff's programme is telecast on Fridays and Saturdays of every week for half an hour. The Limca Book of Records states that the Plaintiff''s game show holds a record of being the longest continuous show of Indian TV, holding the longest sponsor deal of ten years between the Plaintiff and Hindustan Lever Limited, the largest period of direction by a single Director namely Defendant No.1 and for being the only weekly show hosted continuously by a single host, one Annu Kapoor.

9. In January, 2007, the Plaintiff was given to understand

that Defendant Nos.1 and 2 were producing an identical TV game-show titled Antakshari and that Defendant No.3 was exploiting the same on its TV channel “Star One”. In February, 2007, Defendant No.3 commenced broadcasting the show titled “Antakshari – The Great Challenge” on Fridays, Saturdays and Sundays every week for one hour on each of the days.

10. According to the Plaintiff, the Defendants have copied the Plaintiff's game show in all material respects except in respect of two rounds. The difference is merely cosmetic. The basic concept and form has been slavishly copied by the Defendants from the Plaintiff's game show. The game show telecast by Defendant No.3 is also directed by Defendant No.1 who is aware of the Plaintiff's rights.

11. The Plaintiff contends that it is the owner of the copyright in the literary work and the cinematograph film embodying the television game show and is entitled to exclusive use thereof and/or to licence the same; the Plaintiff has not in fact licenced or assigned its rights in respect of the game show to any one including the Defendants and that the Defendants have therefore, infringed the Plaintiff's said copyrights. The Plaintiff has also alleged that the

Defendants have, by slavishly copying the content and presentation of the Plaintiff's television game show passed off their television show “Antakshari – The Great Challenge” as that of the Plaintiff's game show.

12. The Plaintiff filed the above suit on 18.4.2007 and took out the above Notice of Motion for the usual interim reliefs. The Plaintiff made an ad-interim application in the above Notice of Motion on 19.4.2007. At the request of Defendant No.3, the matter was adjourned to 30.4.2007. By an order dated 6.6.2007, the Notice of Motion was ordered to be heard finally on 22.6.2007.

13. The Defendants have apart from denying the Plaintiff's case, also challenged the maintainability of the suit. I will consider the Defendants' case while dealing each of the submissions raised on behalf of the Plaintiff.

14. The following questions arise for consideration :

I). Whether during the period 23.6.1992 to 1.4.1999 Defendant No.1 worked with the Plaintiff under a contract of service ?

II). Whether the concept note “Exhibit “G” to the plaint” was prepared, as alleged by the Plaintiff ?

III). Assuming the answer to question (II) is in the affirmative, whether the Plaintiff has established that it has a copyright in the Concept Note ?

IV). Whether the breach of a copyright in a film can be committed only by duplicating the film itself ?

V). Whether the Plaintiff has established that the Defendants are guilty of passing off their game show as that of the Plaintiff's game show ?

These questions in turn raise subsidiary questions which I will set out while dealing with each question.

**Re : I** **Whether during the period 23.6.1992 to 1.4.1999 Defendant No.1 worked with the Plaintiff under a contract of service ?**

15. Assuming that the concept note is established, it would be necessary for the Plaintiff to further establish that the same was prepared by Defendant No.1 under a contract of service with the Plaintiff. This is in view of Section 17(c) of the Copyright Act, 1957,

which reads as under :-

> **"17. First owner of copyright -** Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein :
>
> Provided that
>
> .....
>
> (c) in the case of a work made in the course of the authors employment under a contract of service or apprenticeship, to which clause (*a*) or clause (*b*) does not apply, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

Admittedly, the Plaintiff's case falls under Section 17(c) and not under any other part of Sections 17.

16. It is necessary to set out in extenso the Plaintiff's letter of appointment dated 22.6.1994, appointing Defendant No.1 with effect from 23.7.1992. I shall do so while dealing with the submissions on the facts of this case.

17. Mr.Dwarkadas submitted that in determining whether Defendant No.1 was engaged under a contract of service or under a contract for service, various factors require to be considered and not merely the contents of the said letter. I agree.

18. It would be convenient to preface a consideration of this question by referring to the law on this subject. The principles for determining whether the relationship is one of a contract of service or a contract for service are clear and well established.

19. The Supreme Court has since inception rejected the control test, the employer's right to control not just what the person is to do, but also the manner of his doing it, as an exclusive test to determine whether the relationship is one of a contract of service or a contract for service. The Supreme Court has further held that the emphasis in the field no longer even rests strongly on the control theory and control is now no more than a factor, although an important one. It has further been held that in its application to skilled and particularly to professional work the control theory has really broken down.

20. The first judgment relied upon by Mr.Dwarkadas is in the

case of *Dharangadhra Chemical Works Ltd. v. State of Saurashtra & Ors., 1957 SCR, 152.* The effect of this judgment was interpreted by the Supreme Court in *Silver Jubilee Tailoring House & Ors. v. Chief Inspector of Shops And Establishment And Anr., (1974) 3 Supreme Court 498.* In paragraph 11, the Supreme Court held that in Dharangadhara Chemical Works, the Court had held that the test of control is not one of universal application.

The Supreme Court further held :-

> **"26.** It is in its application to skilled and particularly professional work that control test in its traditional form has really broken down. It has been said that in interpreting " `Control'" as meaning the power to direct how the servant should do his work, the Court has been applying a concept suited to a past age.
>
> > "This distinction (viz., between telling a servant what to do and telling him how to do it) was based upon the social conditions of an earlier age; it assumed that the employer of labour was able to direct and instruct the labourer as to the technical methods he should use in performing his work. In a mainly agricultural society and even in the earlier stages of the Industrial Revolution the master could be expected to be superior to the servant in the knowledge, skill and experience

> which had to be brought to bear upon the choice and handling of the tools. The control test was well suited to govern relationships like those between a farmer and an agricultural labourer (prior to agricultural mechanization) a craftsman and a journeyman, a householder and a domestic servant, and even a factory owner and an unskilled ‘`hand'. It reflects a state of society in which the ownership of the means of production coincided with the profession of technical knowledge and skill in which that knowledge and skill was largely acquired by being handed down from one generation to the next by oral tradition and not by being systematically imparted in institutions of learning from universities down to technical schools. The control test postulates a combination of managerial and technical functions in the person of the employer i.e. what to modern eyes appears as an imperfect division of labour.” *See Prof. Kahn – Freund in (1951) 14 Modern Law Review, at p. 505.* ”

**“27.** It is, therefore, not surprising that in recent years the control test as traditionally formulated has not been treated as an exclusive test.”

**“29.** During the last two decades the emphasis in the field has shifted and no longer rests so strongly upon the question of control. Control is obviously an important factor and in many cases it may still be the decisive factor. But it is wrong to say that in

> every case it is decisive. It is now no more than a factor, although an important one." *See Argent v. Minister of Social Security & Anr. (1968) 1 WLR 1749 at 1759.*

21. Courts have in the course of time applied other tests, such as the organization test, the economic test and the integration test. With the change in the nature of professions, commerce, business and industry over the decades Courts felt compelled to apply different tests as well as to apply existing tests differently. Even these tests have been held not to be decisive in all cases. There is no absolute, straight jacket formula. A broader, more complicated flexible and multiple or pragmatic approach is to be adopted by a Court while determining the question. A great deal of flexibility in the judicial approach is thus imperative keeping in mind the facts and the nature of each case.

22. Thus, in *Workmen of Nilgiri Co-operative Marketing Society Ltd. versus State of Tamil Nadu & Ors.*, *(2004) 2, Supreme Court Cases, 514*, the Supreme Court held :-

> **"32.** Determination of the vexed questions as to whether a contract is a contract of service or contract for service and whether the employees concerned are employees of the contractors has never been an easy task. No

decision of this Court has laid down any hard-and-fast rule nor is it possible to do so. The question in each case has to be answered having regard to the fact involved therein. No single test — be it control test, be it organisation or any other test —has been held to be the determinative factor for determining the jural relationship of employer and employee."

"**37.** The control test and the organisation test, therefore, are not the only factors which can be said to be decisive. With a view to elicit the answer, the court is required to consider several factors which would have a bearing on the result: (*a*) who is the appointing authority; (*b*) who is the paymaster; (*c*) who can dismiss; (*d*) how long alternative service lasts; (*e*) the extent of control and supervision; (*f*) the nature of the job e.g. whether it is professional or skilled work; (*g*) nature of establishment; (*h*) the right to reject."

"**38.** With a view to find out reasonable solution in a problematic case of this nature, what is needed is an integrated approach meaning thereby integration of the relevant tests wherefor it may be necessary to examine as to whether the workman concerned was fully integrated into the employer's concern meaning thereby independent of the concern although attached therewith to some extent.

**39.** I.T. Smith and J.C. Wood in *Industrial Law*, 3rd Edn., at pp.8-10 stated :

"..... In the search for a substitute test, ideas have been put forward of an 'integration' test i.e. whether the person was fully integrated into the employer's concern, or remained apart from and independent of it. Once again, this is not now viewed as a sufficient test in itself, but rather as a potential factor (which may be useful in allowing a court to take a wider and more realistic view). The modern approach has been to abandon the search for a single test, and instead to take a multiple or 'pragmatic' approach, weighing upon all the factors for and against a contract of employment and determining on which side the scales eventually settle. Factors which are usually of importance are as follows — the power to select and dismiss, the direct payment of some form of remuneration, deduction of PAYE and national insurance contributions, the organisation of the workplace, the supply of tools and materials (though there can still be a labour-only sub-contract) and the economic realities (in particular who bears the risk of loss and has the chance of profit and whether the employee could be said to be 'in business on his own account'). A further development in the recent case-law (particularly concerning atypical employments) has been the idea of mutuality of obligations' as a possible factor i.e. whether the course of dealings between the parties demonstrates sufficient such mutuality for there to be an overall employment relationship."

(See also *Ram Singh* v. *Union Territory, Chandigarh (2004) 1 SCC, 126)* (emphasis

supplied)

> **"42.** The decisions of this Court lead to one conclusion that law in this behalf is not static. In *Punjab National Bank* v. *Ghulam Dastagir* 7 Krishna Iyer, J. observed (at SCC p. 359, para 3): "To crystallise criteria conclusively is baffling but broad indications may be available from decisions."

23. In *Silver Jubilee Tailoring House & Ors. v. Chief Inspector of Shops and Establishment and Anr., (1974) 3 Supreme Court Cases, 498,* the Supreme Court held :-

> **"28.** It is exceedingly doubtful today whether the search for a formula in the nature of a single test to tell a contract of service from a contract for service will serve any useful purpose. The most that profitably can be done is to examine all the factors that have been referred to in the cases on the topic. Clearly, not all of these factors would be relevant in all these cases or have the same weight in all cases. It is equally clear that no magic formula can be propounded, which factors should in any case be treated as determining ones. The plain fact is that in a large number of cases, the Court can only perform a balancing operation weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction 12 See Atiyah, PS. "Vicarious Liability in the Law of Torts, pp. 37-38."

24. The judgments refer to various factors which are important

and relevant depending upon the facts of a case. It is neither necessary nor possible to enumerate exhaustively the factors. The relevance and importance of a given factor would depend upon the nature of the case. A factor may be relevant in one case but not in the other. A factor may be relevant with different degrees of importance in one case as compared to another.

25. It is thus necessary for the Court in each case to consider the various tests and apply them depending upon their relevance to the case and to give each of them the weightage warranted by the nature of the engagement. In other words, it is necessary while deciding a case not only to apply the appropriate test and the relevant factors but to accord to each test and each factor its due weightage depending upon the nature of the business and the nature of the engagement/employment.

26. For instance, while applying the control test, the factors cannot be applied blindly but, in the context of the business and the nature of the relationship.

27. In *Workmen of Nilgiri Co-operative Marketing Society Ltd. v. State of T.N. & Ors., (2004) 3 Supreme Court Cases, 514,* the Supreme Court held :-

> ***"Tests***
>
> **34.** This Court beginning from *Shivnandan Sharma* v. *Punjab National Bank Ltd., AIR 1955 SC 404* and *Dharangadhra Chemical Works Ltd.* v. *State of Saurashtra, 1957 SCR 152,* observed that supervision and control test is the prima facie test for determining the relationship of employment. The nature or extent of control required to establish such relationship would vary from business to business and, thus, cannot be given a precise definition. The nature of business for the said purpose is also a relevant factor. Instances are galore there where having regard to conflict in decisions in relation to similar set of facts, Parliament has to intervene as, for example, in the case of workers rolling *bidis*." (emphasis supplied)

28. In *Silver Jubilee Tailoring House & Ors. v. Chief Inspector of Shops And Establishment And Anr., (1974) 3 Supreme Court Cases, 498,* the Supreme Court held :-

> **"13.** On these facts, it was held that the workers were workmen under the Factories Act and were not independent contractors. This Court pointed out that the nature and extent of control varied in different industries

and could not by its very nature be precisely defined. The Court said that when the operation was of a simple nature and did not require supervision all the time, the control could be exercised at the end of the day by the method of rejecting bidis which did not come upto the proper standard; such supervision by the employer was sufficient to make the workers, employees of the employer and not independent contractors

**"18.** In *V.P. Gopala Rao* v. *Public Prosecutor Andhra Pradesh (1969) 1 SCC 704* the Court said that there is no abstract a priori test of the work control required for establishing a contract of service and after referring to *Bridhichand case (1961) 3 SCR 161* - observed that the fact that the workmen have to work in the factory imply ( *Sic* ) a certain amount of supervision by the management, that the nature and extent of control varied in different industries, and that when the operation was of a simple nature, the control could be exercised at the end of the day by the method of rejecting the bidis which did not come upto the proper standard."

**"35.** The reputation of a tailoring establishment depends not only on the cutter but also upon the tailors. In a many cases, stitching is a delicate operation when the cloth upon which it is to be carried on is expensive. The defect in stitching might mar the appearance not only of the garment but also of its wearer. So when the tailor returns a garment, the proprietor has got to inspect it

> to see that it is perfect. He has to keep his customers pleased and he has also to be punctual, which means that the stitching must be done according to the instruction of the employer and within the time specified. The degree of control and supervision would be different in different types of business. If an ultimate authority over the worker in the performance of his work resided in the employer so that he was subject to the latter's direction, that would be sufficient. In *Humberstone* v. *Norther Timber Mills (1949) 79 CLR 389* - Dixon, J. said :
>
> "The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions." (emphasis supplied)

29. Mr.Dwarkadas relied upon the judgment of a learned Single Judge of the Allahabad High Court in the case of *Arya Pratinidhi Sabha & Ors. v. Arvind Niketan Charthawal & Ors., 1979 ALL. L.J., 1220*. It is true that the learned Single Judge has applied the above principles while considering a case under Section 5 of the Indian Copyright Act, 1914 which was similar to Section 17(c) of the Copyright Act, 1957.

30. However, the point as to whether or not the principles apply to cases under the Copyright Act was not raised before the learned Judge. It was presumed and the learned Judge proceeded on the basis that the principles did apply to a case under the Copyright Act.

31. Dr.Tulzapurkar relied upon several authorities and legal commentaries to indicate the relevant factors for deciding the issue. He submitted that the Court should keep in focus the Copyright Act while considering the issue in the present case. He further submitted that the decisions under one branch of law for deciding the issue cannot be applied to cases under another law. He also submitted that there is no uniform concept of “contract of employment” under different laws.

32. I do not find that any of decisions or commentaries relied upon by Dr. Tulzapurkar militate against the ratio of the above authorities. Nor am I persuaded to hold that the above decisions are inapplicable while deciding a matter under the Copyright Act. The concepts of a contract of service and a contract for service have been the subject matter of decisions both in India and in U.K. long before

even the Copyright Act, 1911. The concepts have been the subject matter of decisions inter-alia in respect of cases pertaining to the Law of Torts and various labour laws. There is nothing to suggest even remotely that the Legislature intended the scope of the expression `contract of service' in Section 17(c) to be otherwise than as has been understood for over a century. I do not read the above judgments being limited or confined to cases other than those under the Copyright Act. There is nothing in the judgments of the Supreme Court referred to earlier or in the judgments relied upon by Dr. Tulzapurkar, I shall refer to hereafter that supports the rather broad submissions on behalf of the Defendants.

The principles enumerated in the judgments are applicable to cases under the Copyright Act.

33. Dr.Tulzapurkar also relied upon the Commentary in The Modern Law of Copyright and Designs, Second edition, Volume 1 by Hugh Laddie, Peter Prescott and Mary Vitoria under Section 11(2) of the English Copyright, Designs and Patents Act, 1988. Where a work is made by an employee in the course of his employment by another person under a contract of service or apprenticeship that other person

is entitled to any copyright subsisting in the work, subject to any agreement excluding its operation. The provision is similar to Section 17(c) of the Copyright Act, 1957. In fact, while considering Section 11 (2), the learned authors refer in detail to various judgments which were delivered not under the Copyright Act alone but various other fields of law as well. There is nothing in the commentary which even remotely suggests that the expression "contract of service" under the Copyright Act ought to receive any different consideration than under other laws. It is in fact useful to note that the learned authors quoted the following passage from the judgment in *Market Investigations Ltd. v. Minister of Social Security [1973] 1 All E.R., 241, at page 253* :-

> "Is the person who has engaged himself to perform these services performing them as a person in business on his own account ? If the answer to that question is "yes" the contract is a contract for service. If the answer is "no" then the contract is a contract of service."

34. The fallacy of Dr. Tulzapurkar's submission is based on the erroneous presumption that the nature of engagement of every author, within the meaning of the term in Section 17, is always the same and that the nature of his engagement is always inherently different from every other engagement. I see no warrant for the

presumption.

35. I hasten to add however, that the tests and the factors would naturally depend upon the nature of the business and the nature of the engagement of a person but this would be so under any enactment or other law.

36. Two judgments relied upon by Dr. Tulzapurkar, *Nora Beloff v. Pressdram Ltd. & Anr., [1973] R. P. C. , 765* and *Parsons v. Albert J. Parsons & Sons Ltd., [1979] Fleet Street Reports, 254,* do not carry the matter further in this regard. The judgments are however relevant while considering another aspect of this case viz. the importance of the manner in which accounts were kept between the parties. I will therefore refer to them while dealing with that aspect of the matter.

37. Dr.Tulzapurkar submitted that the same person could be considered to be under a contract of service with the employer for one purpose such as under the Workmen's Compensation Act but not so for another purpose such as under the Law of Torts. In this regard, he relied upon the judgment in *1955(2) QB, 437*. It is not necessary for the purpose of this case to express any final opinion on this aspect.

38 (A). Dr. Tulzapurkar relied upon the following observations in *Modern v. Swinton And Pendlebury Borough Council, [1965] 1 W. L. R., 576 at page 582 :-*

> "In my judgment here all the other considerations point to a contract of service. It is true, as has been pointed out by Mr.Threlfall, that in fact though the appellant was appointed by the respondents, the power of selection was delegated to the consulting engineers. That, as it seems to me, is nothing more than good practice since the appellant was going to have to work under and with those consulting engineers. Apart from that he was appointed by the respondents, they had the right to dismiss him, he was paid such matters as subsistence allowance, national Insurance contributions and holidays, and in addition there was provision for one month's notice. Pausing there, it seems to me that looked at on those facts, the only possible inference is

> that he was engaged under a contract of service. How different is the contract with Kaufman, who is not paid a subsistence allowance, or National Insurance contributions and is not entitled to holidays. Further there is no provision for termination of his service by notice."

(B). The judgment was relied upon to contrast the first Defendant's letter of appointment dated 22.6.1994 with his own letter of appointment dated 1.4.1999 and the factors which persuaded the Court to hold the Appellant's engagement to be a contract of service which were absent in the first Defendant's case till 1.4.1999.

(C). I do not for a moment suggest that the factors are not relevant. They are however not conclusive of the matter.

39. It would be useful to extract the factors set out in Chitty on Contracts, Twenty-Ninth Edition, Volume II, page 943, relied upon by Dr.Tulzapurkar :-

> "2. THE FACTORS IDENTIFYING A CONTRCT OF EMPLOYMENT
>
> **The factors to be considered.** Recent case law suggests that the factors relevant to the process of identifying a contract of employment may usefully be listed as follows:

(1) the degree of control exercised by the employer;

(2) whether the worker's interest in the relationship involved any prospect of profit or risk of loss;

(3) whether the worker was properly regarded as part of the employer's organistion;

(4) whether the worker was carrying on business on his own account or carrying on the business of the employer;

(5) the provision of equipment;

(6) the incidence of tax and national insurance;

(7) the parties' own view of their relationship;

(8) the traditional structure of the trade or profession concerned and the arrangement within it.

40. To reiterate, the first defendant worked with the Plaintiff between 23.7.1992 and 10.11.2006. The first defendant started working with the plaintiff with effect from the 23.7.1992 on terms and conditions purportedly contained in the letter dated the 22.6.1994

addressed by the plaintiff to the first defendant. I have used the term "purportedly" advisedly for reasons which will be clear later. With effect from 1.4.1999 the first defendant worked with the plaintiff on the terms and conditions contained in the letter dated 1.4.1999. The letter dated 1.4.1999 admittedly constituted a contract of service between the plaintiff and the first defendant.

The question that falls for consideration is whether between 23.7.1992 and 1.4.1999 the first defendant worked with the plaintiff under a contract of service or whether he worked with the plaintiff under a contract for service.

41. The letter dated 22.6.1994 reads as under : -

> "Dear Mr. Singh,
>
> With reference to the interview we had with you, the management is pleased to accept the offer of your services as a **CONSULTANT** on the following terms and conditions with effect from the day you join us i.e. **23rd July, 1992.**
>
> 1. You will be paid a Consultancy fee of Rs.10,000/- (Rupees Ten Thousand only) per month all inclusive. You are required to submit your consultancy bill for your services rendered every month to enable us to effect payment. You will be on contractual employment for Twenty Four months, after which this arrangement unless terminated

shall stand renewed for a further period of Twenty Four months.

2. You will not be entitled to any other company benefits.

3. However, conveyance expenses incurred while on official duty shall be reimbursed as per company's rules. This does not include conveyance expenses incurred while commuting to and fro office & residence.

4. You will have to make your own arrangements for your income tax and other statutory returns if any as applicable.

5. You will be working in an advisory capacity and put your best efforts in discharging the jobs assigned to you from time to time by the Management.

7. This arrangement will be subject to your condition that you will be posted and transferred anywhere in India, or in any department, office or establishment owned or managed by the company depending upon the exigencies of the company's work. At present, you will be posted in Bombay.

9. This arrangement can be terminated by either party by giving three months notice of its intentions to do so before the expiry of the contract period.

10. Upon termination of your contract you will return to the Company all

> the papers, documents and any other Company property that might have come into your possession during the course of your employment with the company, and you will not retain any copies of extracts thereof.
>
> 11. This arrangement is subject to your being declared medically fit by our medical advisors. At the time of joining you may be asked to.
>
> This letter is n duplicate. Kindly return the duplicate copy thereof duly signed by you as a confirmation of your having accepted the terms and conditions contained herein."

There is no explanation from either side why the letter of appointment was issued almost two years after the first defendant started working with the plaintiff. However neither side has said anything about the matter. I have therefore proceeded on the basis that the first defendant worked with the plaintiff even prior to 23.7.1994 on the same terms and conditions as he did subsequent to the said letter.

42. Clauses 1 to 5 support the Defendant's case indicting the relationship between the plaintiff and the first defendant being one of a contract for service. The payment of a consolidated amount per

month would not in itself derogate against a contract of service. However clause 1 stipulates that the payment is towards the first defendant's consultancy fee. The preface to the letter also indicates a contract for service. As submitted by Dr Tulzapurkar, the plaintiff accepted the first defendants offer which was as a consultant. In his affidavit in reply the first defendant has explained that he insisted on being appointed only as a consultant as he wanted to be free to do other work as well.

43. Dr. Tulzapurkar submitted that if I come to the conclusion that all the clauses of the agreement/letter indicate a contract for service I ought to ignore the other circumstances and hold the relationship between the plaintiff and the first defendant to be one of a contract for service.

44. The proposition is not well founded. There may be cases where a document between the parties indicates the relationship to be either a contract of service or a contract for service but that is not necessarily conclusive of the matter. That by itself would not preclude the court from examining all the facts and circumstances of the case while determining the true relationship between the parties.

45. In any event, the letter also contains clauses some of which indicate and support the plaintiff's case of the relationship being one of a contract of service. Clauses 7, 10 and 11 indicate the relationship between the plaintiff and the first defendant being one of a contract of service.

46. Clause 7 entitled the plaintiff to post or transfer the first defendant anywhere in India. A consultant is not normally “posted” or “transferred” anywhere at the employer's choice. I use the term employer here in a neutral sense not indicating the master in a master and servant relationship. A party engaging a consultant does not normally retain the right to “post” or “transfer” a consultant anywhere at his choice.

47. Dr. Tulzapurkar contended that clause 7 was probably included as the first defendant was required in the course of his work to visit different places. He invited my attention to several references which established that the episodes were in fact filmed at places outside Mumbai.

48. Firstly, this was merely a suggestion made across the bar. This was not the first defendant's case on affidavit. Even if it were it

would make absolutely no difference. A party engaging a consultant may require him as a term of the contract/engagement to discharge his functions at different locations. This can be and is normally done by a simple clause to that effect requiring the consultant to discharge his functions including by attending different sites or locations. Such a stipulation however does not confer a right on the employer to post or transfer the consultant anywhere at his choice. A right to post or transfer a person is a strong indication of a contract of service. It is indeed one aspect of control.

49. Added to this is the fact that clause 7 also entitled the plaintiff to post and transfer the first defendant to any department, office or establishment owned or managed by the plaintiff. This stipulation is alien to a simple consultancy agreement.

50. Dr. Tulzapurkar sought to explain this part of the clause saying that the first defendant was required to advise the plaintiff regarding a variety of matters including scriptwriting, directing and composing. This clause therefore according to him merely permitted the plaintiff to avail of the first defendant's advice regarding all these matters. I am unable to agree.

In such cases the contractual term would only provide the fields in which the party engaging a consultant is entitled to avail of his advice. There would be no warrant for making the consultant liable to be posted and transferred in any department, office or establishment owned by the employer. I will assume that script writing, directing and composing may fall within departments in an organisation and so afford some substance to Dr. Tulzapurkar's explanation. But they certainly do not fall within the ambit of the terms “office” or “establishment” as normally understood.

51. It is important to note that there is no plausible or cogent case to this effect in the affidavits filed by Defendant No.1. It is also important to note that this aspect too indicates the Plaintiff's control over the first Defendant.

52. I do appreciate that the term employment in clause 10 cannot be decisive of the matter indicating the relationship to be one of a contract of service. It is however one of the many factors which the plaintiff is justifiably entitled to rely upon in support of its contention.

53. Clause 11 is also indicative of a contract of service. It is not

usual in a consultancy agreement to require the consultant to be medically fit. This is a clause typically found in a contract of employment. There is again no explanation for this clause in the first Defendant's affidavits.

54. Faced with this, Dr.Tulzapurkar stated that clauses 7, 10 and 11 ought to be construed in a practical manner so as to give the entire document commercial efficacy. I agree. This is a commercial relationship whether it is a contract of service or a contract for service. But what I am invited to do is to dilute the effect of clauses 7, 10 and 11 on the one hand but on the other to read the remaining clauses strictly against the plaintiff. I see no warrant for such an approach. The entire document must be read as a whole. There is no justification to read some clauses with one approach and the other clauses with an altogether different approach.

55. Based solely on the letter dated 22.6.1994 the first defendant's case at the highest is that the same read in isolation and removed from the other facts and circumstances which I shall now refer to tilts the balance in favour of the relationship between the plaintiff and the first defendant being one of a contract for service.

But, as I have observed earlier, this would not be the correct approach. It is necessary to consider all the facts and circumstances before arriving at a conclusion as to the nature of the engagement. This is what I will do next.

56(A). Prior to the letter dated 22.6.1994 the first defendant had signed several vouchers sanctioning payments as the authorised signatory of the plaintiff. The plaintiff has referred to ten such vouchers between 3.6.1993 and 25.1.1994. The payments were in respect of conveyance, meals, dues of the lightman and payment for construction of sets.

(B). All the payments pertained to the said television game show Antakshari. The first defendant has in his affidavit in reply stated that he appended his signature only to confirm the expenses for which the vouchers were made. It is true as contended by him, that his is not the only signature in the place specified for the authorised signatory. I am unable to reject this contention as baseless at this stage.

57 (A). Dr.Tulzapurkar placed strong reliance on the TDS certificates issued by the plaintiff between the period April 1994 to

March 1998. The certificates stipulate the payments as having been made to a “CONTRACTOR” or to a “PROFESSIONAL” in the column “NATURE OF PAYMENT”.

(B). This certainly is a strong indication in favour of the relationship being one of a contract for service. It is in consonance with clause 1 of the letter dated 22.6.1994. It is also an indication of the manner in which the parties viewed their relationship.

Indeed had the matter ended here I would have been inclined to the view that the relationship between the plaintiff and the first defendant is one of a contract for service. The matter however far from ends here.

58. It would be convenient at this stage to consider two judgments relied upon by Dr. Tulzapurkar in support of his contention that this fact is sufficient in itself to hold that there was a contract for service and nothing further ought to even be looked into at the interlocutory stage; that in view of the TDS certificates, there is no need for the Court to go into any other issues or to consider any test for deciding whether at the relevant time Defendant No.1 was under a contract of service or a contract for service and that the Plaintiff is

estopped from contending that there was a contract of service, having represented to the authorities, that Defendant No.1 was a consultant and was not receiving a salary or wages but was receiving consultancy fees.

A) Dr. Tulzapurkar relied upon a judgment of a learned Single Judge of the Delhi High court in C*hiranjilal & Anr. v. Bhagwan Das & Ors., AIR 1991, Delhi, 325* and, in particular, paragraph 17 thereof. The question there was one of admissibility of the admissions made in the income tax and wealth tax returns. The learned Judge held that the returns were not admissible in evidence under Sections 40 to 42 of the Indian Evidence Act but are admissible in evidence under Section 43 as they contained admissions of Defendant Nos.1 to 3 with regard to their shares in the property in question.

There is nothing in the judgment which supports Dr. Tulzapurkar's contention that once admissions are found in the tax returns of a party, nothing further requires to be considered or that such admissions are conclusive of the issue.

B) Dr. Tulzapurkar then relied upon the judgment of a Division Bench of this Court in the case of *Smt. Shivani S. Roy &*

*Anr. v. Shri Hari Pada Roy & Ors., , 1997 (5) L.J. Soft, 177 = 1998(2) Bom. C.R., 305.* The learned Judge followed the judgment of the Delhi High Court in C*hiranjilal*' case. The learned Judge referred to the judgment of the Supreme Court in Raj Kumar v. Official Receiver of the estate of M/s.Chiranji Lal Ram Chand, AIR 1996, Supreme Court, 941 where it is held that once the admission is proved the burden shifts on the maker thereof to explain the circumstances under which the same was made. What a party himself admits to be true may reasonably be presumed to be so and until the presumption is rebutted, the fact admitted must be taken to be established.

The judgment of the learned Single Judge and the judgment of the Supreme Court in fact militates against Dr. Tulzapurkar's submissions. An admission is not conclusive evidence. It merely shifts the burden on the maker thereof. It is open to the maker to explain the admission. If adequately explained, the burden shifts again to the other side.

In the present case, the TDS Certificates read with the letter of appointment, no doubt constitute an admission against the Plaintiff.

However, the overwhelming evidence on record even at this interlocutory stage, is sufficient to hold that the Plaintiff has explained the circumstances under which it was made.

C) Nor do I find anything in *Nora Beloff* (supra) and *Parsons' s* cases (supra), which support this submission of Dr. Tulzapurkar.

D) While I would reiterate the importance of this fact in favour of the defendant, I am unable to accept Dr.Tulzapurkar's extreme proposition. Nor do I read the judgments as supporting the same.

59. Dr.Tulzapurkar relied upon letters dated 20.4.1994, 13.5.1995 and 28.3.1998 addressed by the plaintiff to the first defendant revising the consultancy fees/charges. He submitted that as opposed to this, after 1 April 1999 the parties had used the expression salary and not consultancy fees/charges indicating thereby that the parties were conscious of and had drawn a distinction between the nature of the relationship prior to and with effect from 1st April 1999. This fact too read in conjunction with the above facts supports the Defendants case.

60. The following facts however in my opinion tilt the balance and indeed indicate clearly that the relationship between the plaintiff

and the first defendant even prior to 1 April 1999 was that of a contract of service and not a contract for service.

61. Firstly, the said letters dated the 20.4.1994, 13.5.1995 and 28.3.1998 read together and as a whole, do not support the first defendant's case. In the letter dated 20th April 1994 the plaintiff's Chairman stated that he looked forward to the first defendant's "continued career progress". This expression read by itself would not assist the plaintiff. However read with the various other facts, it indicates that even according to the parties the first defendant had a career in the plaintiff and not as a consultant unconnected with the plaintiff.

62(A). This is fortified by an extremely important and significant fact. The first defendant had throughout been placed in a grade in the organisational setup of the plaintiff. For instance, while informing the first defendant of the revision of his consultancy charges, the plaintiff in its letters dated 13.5.1995 and 2.4.1997 expressly stated that the same was "in Grade M-5" and "Grade M-6".

If the first defendant was merely a consultant there would be no question of having placed him in a regular grade like every

other employee of the plaintiff.

(B). Dr.Tulzapurkar submitted that importance ought not to be granted to this aspect as what was probably contemplated was the worth/standing of the first defendant equated to the plaintiff's employees in that grade.

There is nothing on record which even remotely substantiates this suggestion. This explanation across the bar finds no place in the first Defendant's affidavits. Even if it did it would have been of no assistance unless backed by cogent evidence.

63(A). Dr. Tulzapurkar's explanation is nullified and the Plaintiff's case in this regard is fortified by another fact. By the letter dated 2.4.1997 the plaintiff informed the first defendant that in recognition of his performance for the year 1996–97 his “gross salary package” had been revised. As this is a solitary instance of the plaintiff having referred to the first defendant's remuneration as salary, I will presume that it is not of significant importance. However what followed is important. The plaintiff stated :-

> “Company is also pleased to elevate you in the company's Grade M-6”. (emphasis supplied)

Indeed the elevation of the first defendant in the plaintiff's organisation from Grade M-5 to Grade M-6 militates against Dr. Tulzapurkar's suggestion. If the first defendant was merely a consultant there would have been no question of elevating him in the organisational hierarchy of the plaintiff. This aspect to my mind is an extremely strong indication that the first defendant was a part of the organisational setup of the plaintiff and not merely an external consultant. The first Defendant and his services had integrated into the plaintiff's organisation and were undoubtedly a part and parcel thereof.

(B). It is important to note that whereas in his affidavit in reply dated the 14.6.2007 the first defendant specifically deals with Exhibits “B1”, “B2” and “B4”, he does not deal with or even refer to the letter dated 2.4.1997 which is annexed as Exhibit B-3 to the plaint.

64. This conclusion is fortified by an interview given by the first defendant to a publication issued in August 1996 which is annexed to an affidavit filed by the first defended himself. I would give little importance to such publications had they not been relied upon by the first defendant himself. He stated:-

> "The kind of time I spend on edits, it would have been impossible to do so as an outside producer." (emphasis supplied)

65. The first defendant never considered himself an outsider. He considered himself as a part and parcel of the plaintiff's organisation. These are strong indications of the plaintiff having established the integration test and the organisation test.

66. This conclusion is not only fortified but virtually established by a letter dated 15.9.997 which I shall refer to shortly in greater detail. It is sufficient at this stage to extract the following two sentences from the letter :-

> "I have also been given the grade of M-6 by Mr.Vijay Jindal. I am sure this is to establish my standing in the organisation as well as establishing the level of perks that would accrue to me." (emphasis supplied)

Vijay Jindal was the Managing Director and Chief Executive Officer of the Plaintiff. It is important to note that the first defendant did not consider himself as having been given a grade merely for the purpose of establishing the level of perks as suggested by Dr. Tulzapurkar. He considered it as establishing his "standing in the organisation as well as establishing the level of perks....."

67(A). Mr.Dwarkadas then relied upon a “PERFORMANCE RATINGS” chart in respect of the plaintiff. It relates the performance of the first defendant in respect of target achievement, effort level, initiative, competence, commitment, innovativeness, integrity and team spirit. In respect of each of these items there is a self-assessment of the first defendant and an assessment by a reviewer of the plaintiff grading him from C to A+.

(B). Faced with this, Dr.Tulzapurkar suggested that the same may have been filled in with a view to enable the plaintiff to decide whether or not the first defendant ought to be continued and if so whether or not his consultancy fee ought to be reviewed.

(C). Firstly, it is unusual to have such a performance rating in respect of a consultant. I can understand a general assessment for the purpose of the company itself of its consultant's performance.

However the nature of this form clearly indicates that it is used for the employees of the plaintiff generally. It is not the first defendant's case that this form was specially printed or prepared only for consultants or

only for him.

68. Secondly, it is pertinent to note that there has been a self-assessment by the first defendant of his performance with the plaintiff. If the purpose of the performance rating was as suggested by Dr Tulzapurkar the assessment would only have been by the plaintiff and not by the first defendant if he was only a consultant.

69. In the circumstances, I am of the view that the performance ratings is yet another strong indication of the relationship between the plaintiff and the first defendant being one of a contract of service.

70. This brings me to the letter dated 1.4.1999 which was heavily relied upon by Mr Dwarkadas. Considering the importance of this letter it would be appropriate to set it out in extenso, including the endorsements at the foot thereof. It reads as under:-

"COMMUNIQUE"

To : Mr.Raana J P Singh Date : 15 September 1997

From : Gajendra Singh

Sub : Drawing parity with employees for perks

You may be aware that though I have been appointed as Consultant on paper, it is for reasons other than simple consultancy assignment. The nature of my job entails total commitment irrespective of time or holidays and so on.

I have also been given the grade of M-6 by Mr. Vijay Jindal. I am sure this is to establish my standing in the organisation as well as establishing the level of perks that would accrue to me.

Because of the nature of assignment, may I request that I be provided with all other facilities that accrue to an employee, including Accrual of leave/encashment, club Membership facilities, Gratuity, Medical check-up, Medical claim facilities if any and so on.

May I request you to kindly look into the matter please.

Regards,

Sd/-

Gajendra Singh

Mr. Vijay Jindal
I tend to concur with the above

CC : Vijay Jindal

Keeping in view the other, we should extend facilities likewise to :

Gajendra Singh Leave & Medical
Sarika Patil Leave only
Vishwa_& others

Regards,
Sd/-”

71(A). It is important first to note that the first defendant has offered no explanation for the first sentence in this letter despite the fact that it quite obviously was pressed into service with great emphasis by the plaintiff in support of its case of the relationship between the first defendant and itself being one of a contract of service. Despite the same, Defendant No.3 in his first affidavit in reply dated 24.4.2007, gave no explanation for the same.

(B). What is even more important is that the Plaintiff, in paragraph 6 of its affidavit in rejoinder dated 30.4.2007, specifically stated that the first Defendant had not dealt with the said letter and that there was no explanation for the first Defendant having stated in the said letter that his appointment as a “consultant” was only “on paper”.

Thereafter, the first Defendant filed a further affidavit dated 14.6.2007. In paragraph 16, he has dealt with the various paragraphs in the plaint. While dealing with the said letter dated 15.9.1997, he merely states that the same is not suggestive of any acknowledgment

of employment by him; that the reason that he did not want to be bound as an employee, was that he did not wish to tie himself down and wanted to be free to do work for other channels; that however, as the nature of his engagement with the Plaintiff, did not leave him time to follow any other pursuits he thought it fit that the Plaintiff should provide him with other benefits besides the consultancy fees.

I do not consider the explanation satisfactory. It is important to note that once again, there is no explanation whatsoever for his having stated in the said letter dated 17.9.1997 that he had been appointed as a consultant “on paper” and “for reasons, other than simple consultancy assignment.”

I appreciate that this letter is not drafted by a lawyer. But, the significance and the importance of the first sentence thereof, cannot be ignored on that ground. The reluctance of the first Defendant to deal with this aspect is poignant. It dilutes, if not, eradicates the force of his being referred to as a consultant, in the letter of appointment as being indicative of a contract of service.

(C). It is further important to note that even thereafter the first Defendant had an opportunity of dealing with this aspect which he did

not avail of. The Plaintiff in paragraph 4(d) by its affidavit dated 18.6.2007 yet again stressed the point that in the said letter the first Defendant himself had stated that he was a consultant only “on paper”. The first Defendant thereafter filed an affidavit dated 22.6.2007 in reply to the Plaintiff's affidavit dated 18.6.2007. Once again, Defendant No.1 remained silent on this crucial aspect.

72. Thus, it is the first defendant's own case that the reference in the letter of appointment dated 22.6.1994 to his being appointed as a consultant was only on paper and that the same was for reasons other than a simple consultancy assignment. These words clearly indicate that there was more to the letter dated 22.6.1994 in so far as it referred to the first defendant being appointed as a consultant. The first defendant has chosen not to offer any explanation for his choice of words. I see no reason why the Court should speculate on reasons on his behalf. It is impossible in these circumstances to resist an adverse inference against the first Defendant on this aspect.

73. I have already dealt with the importance and the significance of the second paragraph of the letter of appointment dated 22.6.1994 which refers to the Petitioner having been given the

grade of M-6 by Vijay Jindal.

74. The facts read together, persuade me to accept the Plaintiff's contention in its affidavit dated 18.6.2007 [paragraph 4(d)] that the payments were made to the first Defendant as consultancy fees at his instance and insistence.

75(A). On the other hand, I am not inclined to accept Dr. Tulzapurkar's submission that the first Defendant was appointed as a consultant as he did not want to be tied down to the Plaintiff. In fact, the first Defendant appears to have worked exclusively for the Plaintiff. This is established by the first Defendant's admissions.

In an interview annexed as Exhibit `D1' to his affidavit dated 14.6.2007, he stated :-

> “In my life there is no one except `Antakshari'.
> I live and sleep 24 hours with Antakshari”.

He does not say these were exaggerated claims in a film publication.

(B). In paragraph 5 of his affidavit dated 24.4.2007, the first Defendant stated that the reason why he wanted to be appointed only as a consultant was that he did not want to be bound to the Plaintiff and wanted to explore other possibilities.

He stated that in 1993 he was involved in editing several Hindi and Marathi serials and craved leave to refer to and rely upon them. In paragraph 9 of its affidavit dated 30.4.2007, the Plaintiff put the first Defendant to the strict proof of his averment and stated that the same were made prior to the first Defendant joining the Plaintiff. The Defendant however did not produce any evidence to substantiate this contention. Yet again, in paragraph 4(c) of its affidavit dated 18.6.2007 the Plaintiff has referred to the first Defendant's self-appraisal review in which he himself states that during the ten years since his joining the Plaintiff in 1992, he had been working fifteen to sixteen hours every day including all Sundays and holidays.

The first Defendant deals with this paragraph and the Exhibit in paragraph 5 of his affidavit dated 22.6.2007 but does not deny the specific averment that he had been working with the Plaintiff alone and had no time to independently work with other serials.

76. Dr. Tulzapurkar however submitted that the last paragraph

of the letter dated 15.9.1997 indicated a contract for service. He submitted that the relationship thus far between the first defendant and the plaintiff was one of a contract for service and that is why the first defendant had requested the plaintiff to provide him all other facilities that accrue to an employee.

77. The paragraph read in isolation may well suggest the same. Therein however lies the error. The error results from not reading the letter as a whole, in the context of all the facts and in reading it out of sequence. Reading the paragraph in isolation is not justified and does not give a correct picture of the relationship between the parties. It must be read in the context of the entire letter and all the other facts and circumstances which I have referred to earlier. So read I think it is clear that what the first defendant suggested was that his appointment as a “Consultant” was only on paper and that as he was in fact a part of the organisation - “my standing in the organisation”- , his part/standing in the organisation had been graded and as the nature of his job entailed total commitment irrespective of time or holidays he should be accorded all the other facilities which accrue to employees similarly situated.

78. If I am correct in this conclusion about the letter dated the 15.4.1997 the significance of the letter of appointment dated 1.4.1999 is clear and easy to understand. There is no dispute that this letter constituted a regular contract of service and not a contract for service. Dr. Tulzapurkar relied upon it heavily to contrast the same with the letter of appointment dated the 22.6.1994. There is no doubt that the terms and conditions of this letter are substantially different from those in the letter of appointment dated 22.6.1994.

79. Dr. Tulzapurkar relied upon the letter of appointment dated 1.4.1999 to contrast the same with the letter of appointment dated 22.6.1994. It is true that the letter of appointment dated 1.4.1999 clearly constitutes a contract of service. It does not however necessarily follow that the letter dated 22.6.1994 therefore, does not and cannot constitute a contract of service.

80. While the letter dated 22.6.1994 does not contain several clauses present in the letter dated 1.4.1999, it also contains certain essential clauses such as Clauses 7, 10 and 11, which I have already referred to, which indicate a contract of service. It is further important to note that the letter dated 1.4.1999 also contains clauses similar to

the said clauses. For instance, Clauses 7, 10 and 11 of the letter dated 22.6.1994 are similar to Clauses 3, 19 and 13 respectively of the letter dated 1.4.1999. Clause 2 of the letter dated 1.4.1999 places the first Defendant in “Grade M-6”. As stated above, the first Defendant was almost from inception placed in the regular grades of the Plaintiff.

It could thus equally be argued that clauses which are important indications of a contract of service are to be found in both letters of appointment.

81. Mr. Dwarkadas relied upon a leave application made by the first defendant on 6.5.1996. It is not denied a consultant simplicitor would not be required to make an application for leave. It is contended however by the first defendant that this was only an intimation for the convenience of the plaintiff and not an application for leave. Considering the nature of the document it is not possible to press it into service on either side without a trial. I will therefore ignore it. Likewise I will ignore the protocol agreement (Exhibit C to the plaint). In fact Dr.Tulzapurkar relied upon it and in particular clause 1 thereof which inter-alia provides that the copyright shall

constitute the property of the plaintiff and that the first defendant would have no right therein. However this submission was based on the premise that the document was executed only after 1.4.1999. Here again it is not possible to opine conclusively at the interlocutory stage without a trial as to when the document was in fact executed by the first different.

82. There is no question of the Plaintiff having suppressed records such as the register of employees, documents under laws relating to Provident Fund, Gratuity etc. The Plaintiff has plainly admitted that prior to 1.4.1999 it had not shown the first Defendant as an employee. I presume therefore in the Defendant's favour that the documents and records would not show anything otherwise.

83. Dr. Tulzapurkar contended that though the Plaintiff alleges to have enjoyed complete control, no name of any officer who worked as the first Defendant's supervisor or gave him directions, was furnished. He further submitted that the Plaintiff had not indicated any control having been exercised over the first Defendant.

84. Firstly, considering the nature of the first Defendant's work, it would be difficult to apply the control theory to any significant extent.

The first Defendant's own case is that he was responsible for the execution of the entire show. There is nothing to suggest that the Plaintiff did not have the authority to reject his work or to order any modification therein. It is interesting to note that in the first sentence of paragraph 20 of the written submissions filed on behalf of the first Defendant, it is, in fact, contended that factors, such as degree of control, become irrelevant as far as the issue under the Copyright Act is concerned and particularly, in the present case, since a person is required to exercise his own skill. In fact, in *Silver Jubilee Tailoring House & Ors.,* the Supreme Court held that :-

> "It is in its application to skilled and particularly professional work that control test in its traditional form has really broken down....."

Thus, in the facts and circumstances of the present case, even if the Plaintiff had not established control, it would not have affected its case.

85. On the other hand, as indicated above, even in the initial letter of appointment dated 22.6.1994, there were clauses which indicated control viz. the right of the Plaintiff to transfer or post the first Defendant anywhere in India or in any department or office or

establishment owned or managed by the Plaintiff depending upon the exigencies of the Plaintiff's work. Moreover, the test of control is not whether the employer in fact exercised control but whether the employer was entitled to exercise control.

86. I am unable to agree that in the present case the only relevant factors are the traditional structure of the trade, the incidence of tax and National Insurance and how the parties viewed their relationship and that the other factors are irrelevant. I have however dealt with the aspect of how the parties viewed their relationship and have come to a conclusion in the Plaintiff's favour.

87. In the circumstances, I do find that there are factors in the present case which support the case of the relationship between the Plaintiff and the first Defendant as being a contract of service as well as a contract for service. However, having weighed the factors on either side, I am of the opinion that the factors which indicate a contract of service far outweigh the factors which indicate a contract for service. In the result, in my opinion, the relationship between the Plaintiff and the first Defendant from inception was one of a contract of service.

**Re : II) Whether the concept note Exhibit "G" to the plaint was prepared, as alleged by the Plaintiff ?**

88. The Plaintiff's case is that during the course of his employment with the Plaintiff, Defendant No.1 in consultation with the programming team of the Plaintiff, conceptualised and created television serials and/or game shows such as `Antakshari Sa re ga ma', `Sa Re Ga Ma Challenge, 2005' and `Sa Re Ga Ma Little Champs' etc. for the Plaintiff. These programmes were telecast widely on the Plaintiff's channel. The concept note contains the concept and the format in respect of five rounds of the television game show `Antakshari'. The opening paragraph reads thus :-

> **"Antakshari**
>
> **Concept**
>
> **"Antakshari"** has been played within friends and families since so many years. This accent game was used in "Gurukul" by "Gurus", through "Shlokas" recital in Antakshari pattern, to increase memory power of their students. But this Antakshari will be a different as it will have primarily Hindi film songs which will be sung in different rounds in order to maintain interest level in the show.

**Host : Male host / Female Host**

**Target Audience :** Family audience"

The same is followed by the format and details of each of the five rounds.

Defendant No.1 has denied the concept note and alleged the same to be fabricated.

89. The concept note is not referred to in any other document on record. Admittedly, when called upon by the Defendants to produce the original concept note, the Plaintiff relied upon a computer print out of the same. Indeed, a computer print out would suffice for holding a concept note to be an original literary work. The question is whether the concept note was, in fact, prepared in this form.

90. Mr.Dwarkadas relied upon the first Defendant's affidavit in reply dated 24.4.2007 where the first Defendant stated that he conceptualised a talent game show based on an age old game show of Antakshari and in 1992 he had approached Doordarshan to televise the same but that Doordarshan had rejected his idea. Mr.Dwarkadas submitted that it was clear therefore that Defendant No.1 had reduced his idea/concept to writing as no one could

approach Doordarshan without a concept or an idea being reduced to writing.

91. I am unable to agree with this inference. I will assume that a party would normally approach Doordarshan with a concept or idea reduced to a physical form. It is however not necessary that the same would only be reduced in a written format. Indeed, Defendant No.1 in his affidavit in reply dated 14.6.2007 stated that he had sent a cassette to Doordarshan. It is true that this statement is contained in a magazine “Mayapuri” which the first Defendant has craved leave to refer to and rely upon in paragraph 14 of his affidavit. This was published on 8.10.1995, when admittedly there were no disputes between the parties at that time. It is difficult therefore at the interim stage to disbelieve the first Defendant on this issue.

92. Even assuming that a similar concept note was prepared and forwarded to Doordarshan, it was prior to the first Defendant joining the Plaintiff. In any event, there is nothing to show that the same was forwarded to Doordarshan while he was in the employment of the Plaintiff.

93. A strong point in favour of the Plaintiff's case in this regard

is that the first Defendant has not indicated any other material which may have existed in respect of the said game show. It is difficult to believe that there existed absolutely nothing in a material form in respect of the game show of which over 150 episodes had been telecast.

94. However, it is in the first instance for the Plaintiff to establish the existence of the concept note on which it has based its case for infringement of the artistic work. Despite the aforesaid strong indication in favour of the Plaintiff, in my opinion, it has failed to establish the existence of the concept note for a variety of reasons viewed not independently of each other, but collectively. I must however clarify that I do not accept as established the Defendant's case that the concept note is fabricated. All that I find at this stage is that the Plaintiff has not established its existence satisfactorily. I certainly do not rule out the possibility of it being established at the trial.

95. Firstly, there is no contemporaneous record regarding the creation of the concept note. There is nothing which even shows the work which preceded or was preparatory to the concept note.

96. Secondly, the concept note is not referred to anywhere on record. It is referred to for the first time only in the plaint. It was not even referred to in the correspondence which preceded the plaint.

97. Thirdly, despite the serious allegations made by the first Defendant regarding the concept note, the Plaintiff has not adduced any evidence which led to the concept note being stored in the Plaintiff''s computer. I do not hold the fact that there is no signature on the concept note, as an important factor as, in my opinion, there would be nothing unusual about the concept note having been stored in the Plaintiff's computer.

However, the Plaintiff has not even relied upon the relevant folder/file in its computer which would in all probability, contain a date on which the file was created.

98. Mr.Dwarkadas relied upon an affidavit dated 30.4.2007 of one Santosh Shendye, the Plaintiff's head of production. He states that he joined the Plaintiff in November, 1992; that he was closely associated with first Defendant ever since he joined the Plaintiff and was a member of the team which prepared the said concept note towards the end of the year 1992/beginning of the year 1993. He

further states that the concept note was prepared in consultation with other employees and the programming team of the Plaintiff. Lastly, he states that the concept note was worked upon on a computer and that Exhibit “G” is the printout of the said concept note.

99. Firstly, it must be noted that the first Defendant's Advocate by a letter dated 5.6.2007 with reference to the said affidavit, stated that the said Santosh Shendye joined the Plaintiff as a Lightman in the year 1992 and therefore called upon the Plaintiffs to produce the employment record, including the salary slips, details of payment and the relevant statements of account in respect of the said Santosh Shendye. There was no reply to the letter. The Plaintiffs did not supply the material.

100. On behalf of the Defendants, one M.A. Hamati filed an affidavit dated 12.6.2007. He states that he worked as a production executive for the Plaintiff's game show from the first to the fifty second episode and was involved in erecting the entire set for the game show. He further states that the said Shendye was the Light Godown Incharge during his tenure and was not in any manner connected with the programming team of the game show or that any team which

could have prepared the concept note. He further states that the said Shendye used to sit at the studio where the Plaintiff had a godown which was used to keep the lighting equipment and that his job was to send lighting assessories as and when asked for.

101. The first Defendant has also filed an affidavit dated 6.6.2007 to the same effect. He denies that Santosh Shendye was closely associated with him or that he was a member of the team which prepared the concept note. He states that he got to know Santosh Shendye in 1994 and was not associated with him in any manner whatsoever before that.

102. These affidavits were replied to by one Nilesh Mekal, the Plaintiff's legal manager, by his affidavit dated 18.6.2007. At “Exhibit 25” thereof, he has referred to an inter-office memo dated 20.12.1994 from one Sanjay Yaduwanshi to the said Santosh Shendye, requesting him to provide the documents mentioned therein to complete his personal file. The memo was copied to one Subodh Lal.

Subodh Lal has handwritten a representation to him by Santosh Shendye. This endorsement, even if it does not support the

first Defendant's contention regarding the status of Santosh Shendye, it far from establishes the Plaintiff's case regarding the concept note. The endorsement states that Shendye had represented that he was working as a Production-cum-Store keeper with the Dillagi unit from November 1992 to July, 1994. Thus, it is not even the said Shendye's case here that he was working with the Antakshari unit when the concept note was alleged to have been made.

The endorsement further states that for over a year Shendye had been working with the Antakshari unit on the production site. The document is dated 20.12.1994. Thus, as per Shendye's own statement, he worked with the Antakshari unit only over a year prior to 20.12.1994. This certainly does not relate to the period November, 1992 to January, 1993 when the concept note was allegedly prepared.

On the reverse is another handwritten endorsement by the first Defendant in which he states that Santosh Shendye started working with him from 3.9.1993 and had worked on two schedules of Antakshari, as Production Assistant. It is true that in his affidavit in reply the first Defendant replied that he did not know Santosh

Shendye prior to 1994. I am not inclined to brand the statement as false merely because in this endorsement he states that Santosh Shendye started working with him from 3.9.1993. His affidavit is made fourteen years after he met Santosh Shendye and he can hardly be blamed for the inaccuracy of, but a few months.

The endorsement made by the first Defendant on this document does not establish the Plaintiff's case regarding the concept note and/or Santosh Shendye's involvement therein.

103. I realise that the first Defendant has exhibited an unfortunate anxiety to disown his association with the endorsement. For instance, he states that the endorsement was not in his handwriting. But, it was admitted before me that it is in the handwriting of the lady whom he later married. He ought really to have disclosed the same.

The first Defendant also states that Shendye requested him not to change the statement where it was written that he knew him since 1992 because Shendye represented that if he did so, he will not get his salary revised. There is however no such statement in the document.

104. Mr.Dwarkadas submitted that on a point such as this, where it is word against word, I ought to accept Santosh Shendye's word as against the first Defendant's word. I do not for a moment disbelieve Santosh Shendye. However, I find that the Plaintiff has failed to discharge the burden of establishing the concept note at least at this stage. The trial may well unfold another story.

105. Adding to the Plaintiff's difficulty in establishing the concept note, is another point raised by Dr.Tulzapurkar with considerable force.

In paragraph 12 of the plaint, it is stated that during the course of his employment the first Defendant, in consultation with other senior employees and the programming team of the Plaintiff originated the format of a television game show.

Dr.Tulzapurkar submitted that the Plaintiffs had failed to furnish the names of the other senior employees and programming team referred to in paragraph 12 of the plaint. He submitted that the averment made it clear that Santosh Shendye was not the only member of his team. That is correct.

In paragraph 7 of his affidavit in reply dated 14.6.2007, the

first Defendant expressly stated that the Plaintiff had failed to state the names and details of the senior employees and the programming team. The Plaintiff, in paragraph 10 of its affidavit in rejoinder dated 18.6.2007 merely stated that the same was irrelevant. Nilesh Mekal, who verified the plaint and filed the said affidavit, admittedly was not one of the employees. He admittedly also has no personal knowledge of the constitution of the programming team or the identity of the senior employees referred to in the plaint. He has verified the plaint on information and belief and on the basis of the records and not on the basis of personal knowledge.

Further, Santosh Shendye has, in fact, also filed an affidavit thereafter, dated 13.8.2007. Even in this affidavit, he does not furnish the said details.

106. This stand is rather curious. If, in fact, the senior employees of the Plaintiff were involved in making the concept note, it is difficult to understand the Plaintiff's reluctance to furnish their names. This is more so in view of the fact that a serious allegation of fabrication has been made by the first Defendant. In these circumstances, I would have expected the Plaintiff to furnish the

details. The least that must be said in favour of the first Defendant is that the Plaintiff's refusal to do so, would not justify the Court in rejecting or disregarding Dr.Tulzapurkar's submission at the interlocutory stage at least, that an adverse inference ought to be drawn against the Plaintiff to the effect that there was in fact no such production team or group of senior employees and that no other employee of the Plaintiff was willing to file an affidavit to substantiate its case.

107. It is pertinent to note that in his affidavit dated 30.4.2007 Santosh Shendye did not furnish any details of his designation in November, 1992. This is further aggravated by the fact that the said details were not provided despite the fact that in paragraph 3 of his affidavit in reply dated 14.6.2007, the first Defendant questioned the said Shendye's designation in November, 1992 in detail.

108. The first Defendant has also stated that in the credits to the eighth episode by the Plaintiff on 22.10.1993, Santosh Shendye's name appeared as “Lights In-charge”.

Surely, in these circumstances, it was necessary for the Plaintiff to produce the records to establish its case regarding Santosh

Shendye's designation and involvement in the preparation of the concept note.

109. In the circumstances, I am of the view that the Plaintiff has failed to establish the concept note.

110. Dr. Tulzapurkar further submitted that even assuming that the concept note was established, the Plaintiffs has not established its copyright therein as the Plaintiff had not mentioned the names of the other persons viz. the other senior employees and programming team of the Plaintiff who originated/prepared the same along with the first Defendant, as alleged in paragraph 12 of the plaint. He submitted that as all the authors of the concept note are not mentioned in the plaint, the Plaintiff has also failed to establish that they were involved in the preparation of the concept note as employees of the Plaintiff or that they created the work in the course of their employment with the Plaintiff. He submitted that the Plaintiff having taken up the plea that the work was created by the team, posits that there were joint authors. It therefore cannot establish the ownership to Exhibit “G” by proving that only one of the co-authors viz. the first Defendant was in their employment. If the Plaintiff is not able to establish its full

ownership, it cannot maintain the suit in view of Sections 2(z) and 55 (1) of the Copyright Act, which read as under :-

> **"2. Interpretation.-I**n this Act, unless the context otherwise requires,-
>
> (z) "work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors ;"
>
> **"55. Civil remedies for infringement of copyright.-**(1) Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right :

111(A). I am unable to agree with Dr. Tulzapurkar's proposition of law that the pleading as it is, discloses no cause of action inasmuch as it was necessary for the Plaintiff to state the names of the persons who were involved in the making of the concept note. In paragraph 12, the Plaintiff has averred :-

> "During the course of his employment with the Plaintiff, the Defendant No.1, in consultation with other senior employees and programming team of the Plaintiffs, originated

> the format of a television game show titled `Antakshari'. ..... The Defendant No.1 in consultation with the other senior employees and programming team of the Plaintiff, prepared a concept note of the game show titled `Antakshari'."

In other words, the averment is that it is the employees of the Plaintiff who originated the format of the television game show. It was not necessary for the Plaintiff to mention the names of its employees. If these averments were admitted in the written statements, the Plaintiff would undoubtedly be entitled to have been recognised as the owner of the copyright in the literary work comprised in the concept note, the co-owners all being employees under a contract of service with the Plaintiff. I do not agree that as a rule of pleading, it is necessary for an employer to mention the names of the employees involved in the making of any copyright work.

(B). A similar contention was rejected by the Division Bench in *Zee Telefilms v. Sundial Communication, (2003) 5 BCR, 404 (para 21)*. It was submitted that the plaint was not clear as to the ownership of copyright since it was not stated who the author was. The Division Bench noted that in paragraph 2 of the plaint it was

stated that the concept was originated by Plaintiff No.2 together with the other employees from Plaintiff No.1 in the course of their employment, whereby the authorship of the original work would vest with Plaintiff No.1.

The Division Bench held that this was sufficient to indicate who the author of the work was and in whom the authorship of the original work vests.

112. In view of the denial to the averments in paragraph 12 of the plaint, it may be necessary for the Plaintiff to establish by leading evidence that the persons involved in the creation of the concept note, were under a contract of service with the Plaintiff. That however, is a matter of evidence and proof and not a rule of pleading. In the present case, the concept note has not been established as a question of fact and not as a matter of any defect in the pleading.

113. Dr.Tulzapurkar also submitted that the plaint discloses no cause of action as the Plaintiff has failed to plead and prove that there was no contract to the contrary. He based the submission on Section 17(c) of the Copyright Act.

114. The submission is not well founded. Section 17(c) provides

that subject to the provisions of the Act, the author of the work shall be the owner of the copyright therein, provided that in the case of a work made in the course of the author's employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein.

The main part of clause (c) is an exception to the rule that the author of the work is the owner of the copyright. As a matter of law, person who claims the benefit of an exception must prove that his case falls within the ambit thereof. This is well established. The rule must in turn extend to an exception to an exception. Thus, the Plaintiff must prove that the first Respondent was under a contract of service with it. An agreement to the contrary in clause (c) is an exception to the exception to the rule. If the Plaintiff establishes that the author was under a contract of service with it, it is sufficient to invest it with the ownership of the copyright of the work created by the employee. The same would however be subject to a contract to the contrary which the Defendants must establish. Further, the Plaintiff cannot be expected to prove the negative. The party relying upon the

exception would have to plead and if denied establish, the same. If the Defendant raises no defence of there being a contract to the contrary, nothing more is required to hold that the Plaintiff is the owner of the copyright in the work created by the author under a contract of service with the Plaintiff. The first Defendant has not alleged that there was any contract to the contrary.

**Re : III** **Assuming the answer to question (II) is in the affirmative,** whether the **Plaintiff has established that it has a copyright therein ?**

115. As a general proposition, a concept note which contains literary work, is entitled to be protected under the Copyright Act if it contains work which is copyrightable under the said Act. If it contains copyrightable work, the author/owner thereof would be entitled to the protection afforded under the Copyright Act, 1957. There is no magic in the expression “concept note”. It appears to be an expression used in the television/film industry. The mere use of the term “concept note” however, would make no difference. It would be necessary for a Court in each case, to examine whether the concept note constitutes work which is copyrightable and entitled to protection

under the provisions of the Act.

116. Mr.Dwarkadas's reliance in this regard upon the judgment of this Court in *Zee Telefilms Ltd. & Anr. v. Sundial Communication Pvt. Ltd. & Ors., 2003 (5) Bom. C.R., 404 = 2003(4) L. J. Soft, 5* is well founded.

117. It would be necessary to examine whether the concept note relied upon by the Plaintiff is, in fact, copyrightable. Dr. Tulzapurkar submitted that the concept note recorded only a concept, there was no novelty in it and, therefore, did not pass the test of copyright.

118. As I have come to the conclusion that the concept note has not been established by the Plaintiff, I do not think it necessary to consider whether the material contained therein constituted literary work, is entitled to protection under the Copyright Act and, if so, whether the third Defendant's show is an infringement thereof.

**Re : IV) <u>Whether the breach of a copyright in a film can be committed only by duplicating the film itself ?</u>**

119. Mr.Dwarkadas then submitted that the cinematographic

film produced by the third Defendant embodying the television game show, was an infringement of the Plaintiff's cinematographic film embodying the Plaintiff's television game show.

There is no dispute that the Plaintiff is the owner of the copyright of the films containing/embodying the television game show. Nor is there any dispute about the fact that the Plaintiff is entitled to protection of its copyrights therein.

120. Dr. Tulzapurkar and Mr. Tulzapurkar submitted that even assuming that the third Defendant's television game show was identical in all respects to the Plaintiff's game show, there could be no question of any infringement of copyright of the Plaintiff's cinematographic film. In other words, according to them, even assuming that each and every detail with no exception whatsoever of the third Defendant's cinematographic film was identical to the Plaintiff's cinematographic film, there cannot be said to be any infringement of copyright in the Plaintiff's cinematographic film. It was contended that the copyright in a cinematographic film is infringed only by making a physical copy of that film and that there is no infringement of the cinematographic film if a film is independently

made. It was submitted that the Plaintiff's claim for infringement of the cinematographic film must fall as the Plaintiff, as a producer, does not have a right to prevent anyone else from making another film even if the same is identical, so long as it is not a physical copy of the Plaintiff's film. Admittedly, the third Defendant's film is not a physical copy of the Plaintiff's cinematographic film.

121. The learned counsel appearing on behalf of the Defendants relied upon the judgment of a learned Single Judge of this Court in the case of *Star India Pvt. Ltd. v. Leo Burnett (India) Pvt. Ltd., 2003 (4) L. J. Soft, 124 = (2003) 2 B.C.R., 655.*

In that case, the Plaintiffs were the owners of the copyright in a television serial. The Plaintiffs came across the Defendant's television commercial for a consumer product which they contended, was a substantial copy of their television serial. It was contended that the Defendants therein had, inter-alia, misrepresented to the members of the public at large that they had been authorised to make use of the original artistic, literary, musical and cinematographic work for merchandising their product. The Plaintiff claimed various reliefs on the basis of a violation of their intellectual property rights,

including, in the cinematographic film. Paragraph 5 and the relevant portion of paragraph 6 of the judgment read as under :-

> “5. The first question, therefore, that requires consideration is whether the defendants' commercial is a copy of the plaintiffs' TV serial? The case of the plaintiffs has been that as owners of the copyright in the film and considering section 14(d)(i) of the Copyright Act, the plaintiffs, as the owners of the copyright in the film, have an exclusive right to make a copy of the film including a photograph of any image forming part thereof. It is contended that unlike the U.K. and Australia Copyright Acts, the word 'copy' is not defined in the Indian Copyright Act and, therefore, recourse must be had to the technical meaning of the word 'copy'. Reference is placed on the Oxford English Dictionary and Random House Dictionary of the English Language as to the meaning of the word 'copy'. It is then contended that the definition of 'infringing copy' is contained in section 2(m)(ii) of the Act. Hence, imitating the film or making another film which bears likeness or striking resemblance to a copyrighted film would amount to making a copy of the film and, therefore, infringement of the copyright in the film. Assuming that to establish infringement, copyright should be of a substantial part of the plaintiffs' film, the test of substantiality must be from the point of view of the infringing work. It is, therefore, the duty of the Court to ascertain whether a substantial part of the defendants' work consists of a copy of the plaintiffs' work. Reliance is placed on the judgment of the

Apex Court in R.G. Anand v. M/s. Delux Films and others, A.I.R. 1978 S.C. 1613. It is then contended that substantiality is not the question of quantity but of quality. The opening sequence common to each episode and also the peculiar and dramatic high point of the plaintiffs' film is copied and the defendants have saved themselves time, labour and expense in developing something original. Reliance has been placed on paragraph 8.26 of Copinger and Skone James on Copyright, Thirteenth Edition. Reliance is placed on judgments.

On the other hand, on behalf of the defendants, it is contended that the plaint discloses no cause of action and/or in any event no cause of action has accrued to the plaintiffs to allege any infringement of the copyright in the plaintiffs' cinematographic film. Section 14(d) of the Act, it is contended, specifies only three categories of acts of which the owner of the copyright in a cinematographic film has exclusive right. Comparison is sought to be made with section 14(e) where only three categories of exclusive right are given to an owner of the copyright in a sound recording. Reliance is placed on section 2(f) which defines a cinematographic film. It is then contended that in contrast to sections 14(d) and (e) are sections 14(a), (b) and (c), which speak of exclusive rights to the owner of a copyright in a literary, dramatic or musical work. These sections, it is contended, give an exclusive right to the owner to reproduce the work in any material form. This is specifically and significantly absent in relation to a cinematographic film and sound recording

and the exclusive right conferred by the latter sections is to copy the recording of that particular film/ sound. The position becomes clear, it is contended, if the definition of infringing copy in relation to literary, dramatic or artistic work is contrasted with the definition of infringing copy in relation to cinematographic film and sound recording. Contrasting the two, in the former an infringing copy is the reproduction of the original copyrighted literary, dramatic, musical or artistic work. In the latter case, infringing copy is a copy of the film made from the copyrighted film or recording embodying the same sound recording from the copyrighted sound recording. The subsequent film/sound recording is not an infringing copy if it is not copied or made from the same earlier recording. The expression 'to make a copy of the film', it is submitted, is to make a physical copy from the copyrighted film itself and not a reproduction of the copyrighted film, that is, another film which merely resembles the copyrighted film. From the affidavits of Kumuda Rao and Shetty it is clear that the defendants have not copied the film but have made new film. The only contention of plaintiffs is that the film made/ shot by the defendants resembles the plaintiffs' film and, therefore, constitutes reproduction. Reliance is placed on various judgments. The defendants, alternatively contend that the plaintiffs' film and the defendant's film are different. There is no copying or substantial copying of plaintiffs' work, hence, no question of any copyright infringement can arise. It is also once again alternatively submitted that

what is to be compared is the 'whole' of the respective works and not part and if so compared, there is no copying or substantial copying."

"6. It is, therefore, necessary to deal with the submissions as to whether the commercial film made by the defendants is a copy of the plaintiffs' film. Firstly, let me refer to the meaning of the word 'copy' as set out in the Oxford English Dictionary which defines the word 'copy' as under :

"Copy - 1. a thing made to imitate or be identical to another, 2. a single specimen of a publication or issue (ordered twenty copies), 3a. matter to be printed, b. material for a newspaper or magazine article (sandals made good copy), c. the text of an advertisement. 4a. a model to be copied, b. a page written after a model (of penmanship) 1 to make a copy of b (often foll. by out) transcribe, 2. into make a copy rather than produce something original, esp., clandestinely 3. to (foll. by to) send a copy of (a letter) to a third party, 4. to do the same as; imitate copy-edit edit (copy) for printing."

Similar Random House Dictionary of the English Language defines the word 'copy' as follows :-

"Copy - 1. an imitation, reproduction, or transcript of an original. 2. written matter or artwork to be reproduced in

printed form, 3. text to be read or heard, as distinguished from pictures to be seen in newspapers, magazines, television, commercials, etc., 4. one of the various examples or specimens of the same book, engraving, or the like, 5. Brit informal (in schools) a composition, a written assignment, 6. Archaic something that is to be reproduced, an example or pattern - 7. to make a copy of; transcribe; reproduce. 8. To follow as a patter or model, 9. To make a copy or copies, 10. to make or do something in imitation of something else."

Section 2(m)(ii) defines infringing copy as follows: -

"2(m) 'infringing copy' means-

**(ii) in relation to a cinematographic film, a copy of the film made on any medium by any means.**"

Section 14 of the Copyright Act, 1957 for the purpose of the Act defines 'copyright' to mean the exclusive right subject to the provisions of the Act, to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof, namely:-

"(d) in the case of a cinematograph film:

(i) to make a copy of the film, including a photograph of any image forming part thereof;

(ii) to sell or give on hire, or offer for sale or hire, any copy of film, regardless of whether such copy has been sold or given on hire on earlier

occasions;

(iii) to communicate the film to the public."

It will, therefore, be essential to find out as to the meaning of the word 'copy' in the absence of it being defined in the Act. Reference can be made to Copinger and Skone James on Copyright, Thirteenth Edition, at paragraph 3.29, some portions of which may be reproduced : -

".....it has been stated that skill, labour and judgment merely in the process of copying cannot confer originality and the mere copyist cannot have protection of his copy, particularly, therefore, where the reproduction is in the same medium as the original, there must be more than an exact reproduction to secure copyright; there must be some element of material alteration or embellishment which suffices to make the totality of the work an original work. If the original, in the case of a painting, is used merely as a model to give the idea of the new work or, in the case of a photograph, merely as a basis to be worked up by photographic process to something different, then the new work may be entitled to protection; but, if the result is simply a slavish copy, it will not be protected."

The same authors in the Fourteenth Edition in paragraph 7.98 have dealt with 'Films'. The learned authors have stated as under :-

"It is an infringement of the copyright in a film to make a copy of it, or a substantial part of it,

whether directly or indirectly and whether transiently or incidental to some other use. This includes making a photograph of the whole or any substantial part of any image forming part of the film. As with a sound recording, it is not expressly stated that copying of a film includes storing it by electronic means but again it is suggested that it does. Again, the copyright in a film is infringed if the recorded moving images, are directly or indirectly copied but not if the same or similar images are recorded independently, for example by reshooting the subject matter of the film. Again, however, underlying works such as the screenplay may be infringed by such means."

As pointed earlier contrasting sections 14(d) and (e) on the one hand and sections 14(a), (b) and (c) on the other, in the latter case the owner of the copyright has exclusive right to reproduce the work in any material form. This is absent and excluded insofar as the former case (cinematograph film/ sound recording). The exclusive right in the former is to copy the recording of a particular film/sound recording. It is, therefore, clear that production by another person of even the same cinematographic film does not constitute infringement of a copyright in a cinematograph film. It is only when actual copy is made of a film by a process of duplication i.e. by using mechanical contravance that it falls under section 14(d)(i). The expression to make a copy of the film would mean to make a physical copy of the film itself and not another film which merely resembles the film. The making of another film is not included under section 14(d)(i) and

> such other film, even though it resembles completely the copyrighted film, does not fall within the expression 'to make a copy of the film'. Therefore, if the film has been filmed or shot separately by a person and it resembles the earlier film, the subsequent film is not a copy of the first film and, therefore, does not amount to infringement of whole of the copyright of the first film. The position in case of literary, dramatic or artistic work seems to be different. A narrow copyright protection is accorded to a film/sound recording than for literary, dramatic or artistic work. The reason perhaps could be that they have to be original to satisfy the test of copyrightability, whereas the requirement of originality is absent for claiming copying in cinematograph films/sound recordings.
>
> .....
> .....”

122. The learned Judge after referring thereafter to various judgments of the English and Australian Courts concluded as under :-

> “Therefore, considering the terminology used in the Act the facts on record and the cases discussed it is clear that the defendants made their own film independently. The film of the defendants, therefore, is not a copy and, therefore would not amount to an infringement of the plaintiffs' copyright in its film considering the language of section 14(d) of our Copyright Act.

> 7. Then the issue to be addressed is whether there is substantial copying which would give rise to a cause of action to the plaintiffs. At this prima facie stage once the view is taken that the defendants film is not a copy of the plaintiff's film it really would not require that this second submission be considered."

123. The judgment certainly supports the extreme proposition submitted by Dr. Tulzapurkar and Mr. Tulzapurkar on behalf of the Defendants. I consider myself bound by the judgment.

124. Mr.Dwarkadas however submitted that the judgment was per- incuriam and I ought not to consider myself as bound by the same. I do not agree.

125. Firstly, the judgment is not based merely on the foreign judgments referred to by the learned Judge although I doubt whether it would have made any difference even if it was. The learned Judge came to the conclusion based on his interpretation of the provisions of the Copyright Act, 1957. The binding effect of the judgment would not be affected merely because certain provisions may not have been referred to. Further, the judgment of the Supreme Court in *R.G. Anand v. M/s. Delux Films and others, A.I.R. 1978 S.C. 1613* was referred

to by the learned Judge. It cannot therefore be said that the judgment is per-incuriam in view of the said judgment.

126. Nor can I agree with Mr.Dwarkadas's submissions that the judgment is per-incuriam in view of the judgment of the Supreme Court in I*ndian Performing Right Society Ltd. v. Eastern Indian Motion Pictures Association & Ors., (1977) 2 Supreme Court Cases, 820.*

127. The question that is presently under consideration did not fall for consideration before the Supreme Court in *Indian Performing Right Society Ltd.*' case. The question that fell for consideration before the Supreme Court was whether the composer of lyric or musical work retains a copyright in the lyric or musical work if he grants a licence or permission to an author/owner of a cinematographic film for its incorporation in a sound track of the cinematographic film. As their Lordships noted in paragraph 17 : ".....the core of the question was whether the producer of a cinematographic film can defeat the right of a composer of music .. or lyricist by engaging him." It is clear however that the objection raised on behalf of the Defendants did not fall for consideration of the Supreme Court. Nor did the Supreme Court express any opinion,

even obiter, regarding the same.

128. Mr.Dwarkadas, Dr. Tulzapurkar and Mr.Tulzapurkar invited me to consider this question of law even apart from the judgment in *Star India Pvt. Ltd. v. Leo Burnett (India) Pvt. Ltd., 2003 (4) L. J. Soft, 124 = (2003) 2 B.C.R., 655.*

129. I heard them at considerable length especially in view of Mr.Dwarkadas's strenuous efforts in persuading me to the view that I am not bound by the judgment. I am bound by the judgment. Being bound by the judgment, I do not consider it necessary to refer to the extremely detailed and if I may say, with respect, well researched arguments by all the learned counsel.

130. I must however in fairness to Mr.Dwarkadas, clarify that I do not for a moment suggest that the submissions made by him are without force. Nor do I suggest that his submissions do not require serious consideration. Indeed, this important question of law under the Copyright Act is of enormous general and public importance with drastic consequences to the entire entertainment industry and, in particular, to the film and television industry and to producers of cinematographic films.

131. I however decline the invitation to consider these questions as I consider myself bound by the judgment in *Star India Pvt. Ltd. v. Leo Burnett (India) Pvt. Ltd.*

132. The question must therefore be answered in the affirmative and against the Plaintiff to wit there is no infringement of the Plaintiff's copyright in the films embodying the Plaintiff's game show in view of the judgment in *Star India's* case.

**Re : V) Whether the Plaintiff has established that the Defendants are guilty of passing off their game show as that of the Plaintiff's game show ?**

133. This brings me to the Plaintiff's case of passing off. The Plaintiff's case is that the Defendants have slavishly copied the content and presentation of its television game show and that the Defendants game shows constitute passing off since making and broadcasting thereof inherently tantamounts to the Defendants misrepresenting to the members of the public and the trade that they are associated with the Plaintiff. The misrepresentation on the part of the Defendants, in making and broadcasting the television game show "Antakshari – The Great Challenge" is calculated to damage

and erode the Plaintiff's exclusive proprietory rights and goodwill in the television game shows `Close Up Antakshari' and `Titan Antakshari', the content and/or presentation and the word `Antakshari' in relation to any television game show. The Plaintiff has also specifically averred that the advertisements for the television game shows `Close Up Antakshari' and `Titan Antakshari' have resulted in accrual of an enviable reputation and goodwill in the television game shows and their association with the Plaintiff. Further the Plaintiff contends that the Defendants by their aforesaid acts are also indulging in unfair competition. The Plaintiff therefore submits that it is entitled to a perpetual order and injunction restraining the Defendants from making and broadcasting the television game show `Antakshari – The Great Challenge' and /or using the content and/or presentation and/or the word `Antakshari' in relation to the television game show so as to pass off the Defendants television game show `Antakshari – The Great Challenge' as being a television game show associated with and/or authorized by and/or in any manner connected with the Plaintiff.

134. In support of his submission that a passing off action is not

limited to goods, Mr. Dwarkadas relied upon the judgment of the Supreme Court of New South Wales, in the case of *Hexagon Pty. Ltd. v. Australian Broadcasting Commission, [1976] R. P. C., 628* where the learned Judge after referring to the above passage in *A. G. Spalding & Bros.,* observed as under :-

> "The principle of passing off is not limited to goods (cf *Samuelson v. Producers' Distributing Co. Ltd.* [1932] 1 Ch 201; [1931] All ER 74, where the property involved was the right of the plaintiff in a stage sketch). Lord Hanworth MR ([1932] 1 Ch at 208) said: "The ground on which I think the plaintiff is entitled to complain is that, he being entitled to the copyright in his sketch, including the right to its reproduction as a film, the defendants have attempted to pass off their production as a production of the plaintiff's sketch and to make use of the reputation which belonged to the plaintiff's sketch in favour of their production. It was therefore right for the plaintiff to bring a passing-off action."
>
> Further, in *Henderson's* case (already referred to), Manning J., at p. 598, indicated that the false representation may have been made "either in relation to the plaintiff's goods, his services, his business, his goodwill or his reputation. Indeed I am of the opinion that the categories in this regard may still be open and that the development of new or altered practices in business, in trade

> or in professions may in the future result in further classes becoming apparent".

135. I am in respectful agreement with the above principle. There is no warrant for restricting passing-off actions to goods. The basis of a passing-off is a false representation by a person which is likely to cause the other damage. I find nothing to suggest and my attention has not been invited to anything which pursuades me to hold that a passing off action is available only in respect of goods.

136. The Defendants then submitted that in programmes of the type with which this case is concerned, no question of passing off can arise as there is no pre-determined work or programme; in each programme/episode, items and things together constitute the film and each programme is different from the other in various respects, such as, music, script, participants, dialogues and sets. It was contended therefore that there was no question of the public being faced in its mind with any particular or certain programme or film as identifying or being associated with the Plaintiff alone.

137. I am not inclined to accept the submission that a passing off action cannot lie in the case of the reality show or in the case of a serial which involves the spontaneous participation and interaction of

different participants in each episode. It is true, indeed obvious, that in shows such as these, the participants are bound to change. By its very nature in such shows, input from the participants is bound to be different in each episode. That by itself would not lead to a conclusion that a passing off action cannot lie in such shows.

138. Whether a passing off action can be maintained in respect of such shows, must necessarily depend upon the facts of each case. It is impossible to devise any formula for determining whether the Plaintiff in such an action has made out a case of passing off. It would depend upon a variety of factors which cannot possibly be enumerated exhaustively.

139. For instance, if the programme consisted of a simple music contest where the participants in each show sing songs chosen by them and the winners of each show would then participate in the next show and so on, till the final round, it would be difficult to maintain a passing off action.

On the other hand, if the musical contest were to be held in a novel manner, with additional, novel, innovative inputs, the mere fact that the participants changed from round to round may not come

in the way of the Plaintiff's maintaining a passing off action.

The test in each case therefore is whether the show is sufficiently novel and original so as to create a lasting and significant impression on the viewer. If it is, I see no reason why a passing off action cannot be maintained in respect thereof.

140. In *Anil Gupta & Anr. v. Gunal Das Gupta & Ors., 97(2002) Delhi Law Times, 257,* a learned Single Judge held that copyright could exist in respect of a reality show. The learned Judge held that if an idea is developed in a concept fledged with adequate details, it is capable of registration under the Copyright Act. The learned Judge granted the reliefs based on the findings that there was in fact novelty in the said show. The learned Judge held that the Plaintiffs was a novel concept original in thought and was therefore capable of being protected.

141. That shows such as these can be novel and unique, is in fact suggested, if not expressly admitted by the Defendants themselves. In paragraph 4 of its affidavit dated 24.4.2007, the third Defendant has claimed its show to be “unique and different than their earlier programme “Chalti Ka Naam Antakshari” or other television

shows based on the concept of Antakshari". Defendant No.3 describes its show as containing a "unique format prepared and conceptualized by them". Defendant No.3 further claims that it "has included a number of unique and novel features and elements in its game show, which has made it original and different and distinct from the other game shows based on Antakshari, including the Plaintiff's game shows". Defendant No.3 has further claimed that "their game show is their own independent and original creation and not a copy of the Plaintiff's game show in any manner".

142. I am not concerned here with the question of confidentiality which was also considered by the learned Judge. Although Mr.Dwarkadas did submit that the considerations which entitle a Court to grant reliefs in a case founded upon confidentiality are the same as in a passing-off action, I do not consider it necessary to decide the point in this matter.

143. On behalf of the Defendants, it was submitted that it was incumbent upon the Plaintiff to identify precisely the work the Plaintiff seeks to protect against the tort of passing off. The Plaintiff had not identified which work or film or episode of the Plaintiff's show is to be

compared with that of the third Defendant's show to consider whether or not there is any similarity leading to confusion and passing off. It was also submitted that the Plaintiff had failed to identify the work which according to it, the Defendants were guilty of passing off. It was also submitted that on the Plaintiff's admission in paragraph 15 of the plaint, the Plaintiff's game-show had changed from time to time. The Plaintiff's comparison of its game-show with the third Defendant's game-show can be of no avail to the Plaintiffs as its game-show of 2007 could not possibly have acquired any reputation/goodwill.

144. In support of the submissions, Dr. Tulzapurkar relied upon the judgment of the Court of Appeal in *Tate v. Fullbrook, (1908) 1 K.B., 821* where the Court of Appeal held that the Dramatic Copyright Act, 1833 creates a monopoly, and in such a case there must be certainty in the subject-matter of such monopoly in order to avoid injustice to the rest of the world.

145. Although the observations of the Court of Appeal are in respect of the Dramatic Copyright Act, 1833, the principle, in my opinion, would be applicable to a passing off case as well. Unless the

Court is clear as to the subject-matter sought to be protected by the Plaintiff, there would be no question of protecting the same.

146. The question therefore is whether the Plaintiff has identified the work in respect of which it seeks protection. I think it has. The Defendants have placed strong reliance on the following averments in paragraph 15 of the plaint :-

> “Over a period of time, the Plaintiff's television game show `Antakshari' has consisted of various rounds, which have been changed with time.”

Based on this averment, it was further contended that the details and the format set out in the subsequent paragraphs of the plaint relate only the present game-shows telecast by the Plaintiff in the year 2007.

147. I do not find the submission to be well founded. The strong emphasis on the above averment in the plaint is without substance for more than one reason.

Firstly, the error arises on account of the learned counsel appearing on behalf of the Defendants relying upon one sentence in the plaint isolating it from the rest of the plaint. A fair reading of the plaint as a whole, does not support either of the Defendants'

submissions. Even paragraph 15 read as a whole, does not support the Defendant's contention. It reads as under :-

> "15. The television game show `Sansui Antakshari' ceased to be on-air with effect from 17th June, 2005 on the Plaintiff's channel. Thereafter, with effect from 5th January 2007, the Plaintiff re-started the television game show as `Titan Antakshari' and the same continues on Fridays and Saturdays of every week. The programme is for one-half hour. Over a period of time, the Plaintiff's television game show `Antakshari' has consisted of various rounds, which have been changed with time. The details and format of the television game show broadcast by the Plaintiff over a period of time, are given hereinabelow :"

148. The second sentence itself makes it clear that the Plaintiff's game-show which was telecast upto 17th June, 2005 "re-started" with effect from 5th January, 2007. It was therefore not a new show but the same show. The last sentence too establishes the same as is apparent from the expression "over a period of time". Thus, according to the Plaintiff, what is being telecast presently is, but a continuation, of its earlier game-shows.

149. Secondly, this contention was never raised in any of the affidavits filed on behalf of the Defendants. Indeed, the Defendants

were never confused or at a loss to identify the work in respect whereof the Plaintiff has sought protection. Any doubt in this regard is set at rest by the fact that in the affidavits filed on behalf of the Defendants, it is in fact contended that there was no similarity between the Plaintiff's work and the Defendant's work. Indeed, the Defendants in their affidavits have tabulated the differences according to them between the Plaintiff's shows and the third Defendant's shows.

The Defendants themselves were therefore clear as to the identity of the work in respect whereof protection is sought.

150. The reference to change in paragraph 15 of the plaint, was not to the Plaintiff's game-shows prior to 2007 viz-a-vis those of the year 2007. The averment is general in its nature regarding the Plaintiff's game-show. Indeed, it is interesting to note that Defendant No.1 himself stated in one of his interviews :-

> “Even now you will find that every time there's something new in this programme but the original concept remains the same.”

151. The next question is whether the Plaintiff has established its reputation in the said game show.

Dr.Tulzapurkar and Mr.Tulzapurkar submitted that the Plaintiff had failed to establish any reputation in its television game show.

152. What I find particularly surprising is that the Defendants have gone to the extent of alleging that the Plaintiff has developed no reputation whatsoever in the said game show. The documents relied upon by the first Defendant establish the sheer falsity of this denial.

153. Before referring to the documents relied upon by the first Defendant himself, it is necessary to note a few facts about the Plaintiff's television game show.

The Plaintiff's programme started on its TV Channel "Zee-TV" under the caption `Close Up Antakshari' in September, 2003, as it was sponsored by Hindustan Lever Limited for its toothpaste Close-Up. It was so telecast upto the year 2002 with a four month break in between. Thereafter the sponsor changed and the same show was titled `Sansui Antakshari'. The programme continued to be so televised till 17.6.2005. There was another break at this stage. From 5.1.2007 the Plaintiff re-started the television game show as `Titan Antakshari', in view of the change of the sponsor. It is telecast every

week on Fridays and Saturdays for half an hour. It is pertinent to note the following entry in the Limca book of records in respect of the Plaintiff's television game show.

> **"National Record**
>
> The Indian television industry's longest running musical game-show Close-up Antakshari has continuously run on Zee TV since 1993 with only a four month break in 2002. It holds record of being the longest continuous show on Indian television, holding longest sponsorship deal of 10 years (between Zee TV and Hindustan Lever Ltd's Close Up toothpaste), longest period of direction by a single director, Gajendra Singh and for being the only weekly show hosted continuously by a single host, Annu Kapoor. The show is now sponsored by Sansui and is called Sansui Antakshari."

154. I will now refer to the first Defendant's own statements/interviews which have been relied upon by him and annexed to his affidavits. I would not normally rely upon newspaper articles or such publications. However, these publications have been relied upon by the first Defendant himself and he certainly cannot deny the contents thereof or object to the same being referred to.

155. To his affidavit dated 14.6.2007, the first Defendant has annexed an article/interview published on 8.10.1995 in Mayapuri. The

following extracts, from the rather poor translations, speak for themselves and establish the first Defendant's admission of the Plaintiff's enormous reputation in its said show.

> **"GAJENDRA SINGH**
>
> The dream which I saw completed..... ..... .....
>
> The magic is that which creates an impact on the mind. "Antakshari" is the name of such magic. The publicity of which is such that to-day on every channel Antakshari is played. It is said that in the foreign countries people wait for Antakshari as if some times people used to wait for "Hum Log" "Buniyad". The only credit for making Antakshari" famous goes to the Gajendra Singh. Now after completing hundred episode this month in September has completed 125th week. But there is no reduction in its publicity. This program is becoming more interesting than earlier.
>
> When we met Gajendra Singh in his office we asked :
>
> "When you started "Antakshari" program did you expect that it will be popular like this ?"
>
> "No. I did not expect it to reach this stage of popularity, though I knew that this program will not come under the category of flop show. ..... .....

To-day since it is successful people are copying
it. .....
.....

If I would have not prepared such team and if I was not technically good then it would not have received the response which it is receiving to-day .....

Whom do you give the credit of the success of “Antakshari”? I asked. The stars of the same are neither Annu Kapur nor Durga nor I. Stars of the same are those people who participate in it. If they were not then there is no importance of the same. Therefore there is more importance to them than us. Its craze is created due to their interest.
.....
.....

In these which episode was appreciated much ? I asked

All the episodes were appreciated by people. The special episode of the children was done for which huge efforts were required to be taken. Upto 3 months rehearsal was taken with children. No body had thought sitting in Kanpur, Patna, Hyderabad etc cities that they will be able to participate in program at Mumbai. The Dubai episode will be remembered for this reason that to-day it has become difficult to play cricket between India-Pakistan and Bangladesh. But in Dubai people of all these

three countries participated and not only this even the Shaikh of Dubai participated in "Antakshari" and sang Hindi songs. Pakistanis were also happy. They said that they were missing to participate in this program. They were not able to come to India. Therefore we have done good thing by coming there. The credit of Dubai episode goes to ZEE TV. Otherwise it is not possible

for any other to spend so much money." Gajendra Singh said."

.....

"What now after "Antakshari" and SAREGAMA" I asked

There is more world ahead of stars. This is just the beginning. This has given me that satisfaction which money could not give. Go in any of the part of the world you will find people praising "Antakshari". Looking to which I feel that the dream which I saw is completed. Due to which Lion Club has given the award of Best Director. "Antakshari" and Cinegoers also gave award of Best Serial. After this success now there is desire of presenting one soap opera. The work is going on over it."

156. In his affidavit in reply dated 24.4.2007, the first Defendant relied upon and annexed an article titled Games People Play in a publication titled Entertainment Guide of August, 1996. It is an

interview of the first Defendant on the occasion of the 150th telecast of the Plaintiff's show. The author describes the Plaintiff's show as legendary. The author states that the Plaintiff's game "show has made it big".

In the course of the interview, the first Defendant himself refers to the Plaintiff's television game show as having reached "a big landmark". He states : "Today the programme is very popular and everyone knows about it ....."

Thirdly, the first Defendant states: "It is a national and an international phenomenon".

157. There can be really no doubt about the enormous reputation developed by the Plaintiff over the last fourteen years in its television game show. I am in fact at a loss to understand how the first Defendant could ever have denied the same.

158. It was next submitted on behalf of the Defendants that the Plaintiff had not established misrepresentation which is the other essential ingredient in a passing off action. It was also submitted that the Plaintiff had failed to establish likelihood of confusion or deception.

159. In support of these contentions, the Defendants submitted that there is no likelihood of sponsors thinking that the third Defendant's game-show is in fact that of the Plaintiffs. I will presume that to be so, especially in view of the fact that there is no material to indicate that the sponsors have in fact been mislead into believing the same. In the absence of any material, I am not inclined to presume that sponsors who would naturally carry out various investigations, would not ascertain the source of the programme.

160. It was contended that there is no likelihood of viewers being confused in view of the fact that the Plaintiff and the third Defendant's shows are telecast on different channels. The logo of the Plaintiff and the third Defendant appear on the television screens during the telecast of any show. That is so. It is highly unlikely that viewers would not be aware of the channel they are watching. That this is so follows from more than just the fact that each broadcasting company also telecasts its logo which appears on every television screen. Misrepresentation does not occur in the minds of viewers who may happen to see but one episode or casually while, if I may use the expression, “channel surfing”. Passing off cannot be judged

qua such viewers. Regular viewers of such game-shows would normally be expected to note the day and time when the same are telecast. If I am right, such a viewer, while accessing the show at a particular time, would of necessity be aware of the particular television channel to be accessed.

There will thus be no confusion in the minds of the viewers as to on which channel a particular programme is to be telecast. In other words, it is not as if the viewer would access the programme on the third Defendant's channel thinking that it is the Plaintiff's television channel.

161. The matter however does not rest there while considering a case of passing off in respect of television-shows. It is not that a show can only be telecast on a particular channel. The same show can be telecast on one or more channels, at the same time or at different times. It is entirely a matter of agreement between the owner of the show and the owners of the TV channels. The question therefore is whether viewers think or are likely to think that the Plaintiff is associated with the programme being telecast by the third Defendant or has permitted the same or that a programme though

telecast by the third Defendant actually belongs to or is the work of the Plaintiff.

In my opinion, if this is established, the Plaintiff must be held to have succeeded in establishing a case of passing off.

162(A). Counsel for the Plaintiff as well as the Defendants relied upon the following classic observations of Lord Parker in *A. G. Spalding & Bros. v. A. W. Gamage Ltd. (1915) 32 RPC 273 (HL) at 284 :-*

> "My Lords, the basis of a passing-off action being a false representation by the defendant, it must be proved in each case as a fact that the false representation was made. It may, of course, have been made in express words, but cases of express misrepresentation of this sort are rare. The more common case is where the representation is implied in the use or imitation of a mark, trade name, or get-up with which the goods of another are associated in the minds of the public, or of a particular class of the public. In such cases the point to be decided is whether, having regard to all the circumstances of the case, the use by the defendant in connection with the goods of the mark, name, or get-up in question impliedly represents such goods to be goods of the plaintiff, or the goods of the plaintiff of a particular

> class or quality, or, as it is sometimes put, whether the defendant's use of such mark, name, or get-up is calculated to deceive." (emphasis supplied)

(B). Mr. Dwarkadas did not dispute the ratio of the judgment of the Court of Appeal or of the House of Lords in *Reckitt & Colman Products Ltd. v. Borden Inc. & Ors., (1990) 13 RPC, 341 at 377,* relied upon by Dr. Tulzapurkar. Dr. Tulzapurkar relied upon the observations at pages 377 to 379 of the report of the judgment of Slade LJ. in the Court of Appeal, essentially in support of his submission that the common law leans against the recognition of a monopoly right and that it is necessary for a Plaintiff in a passing off action to establish in the first place that he has selected peculiar-novel-design as a distinguishing feature of its case and that his goods are known in the market and have acquired a reputation in the market by reason of that distinguishing feature and that unless he establishes that, the very foundation of his case falls.

163. Mr. Dwarkadas relied upon an article published in January, 2007 which is annexed to the first Defendant's affidavit dated 24.4.2007. The reliance is without any substance. Mr. Dwarkadas

relied upon the statement :-

> “Antakshari has always been associated with Zee TV.”

The statement however was made by the Plaintiff's Senior Vice President and was not made by or on behalf of the Defendants. It was contended however, that Defendant No.1 while relying on the document, had not denied the contents of the same. This would not be a fair approach to the matter. Defendant No.1 relied upon the article for a different purpose altogether. He relied upon it to indicate that the Plaintiff knew about the Defendant's production, at least, as in January, 2007 i.e. the date of the article. I am not prepared therefore to hold that the statement by the Plaintiff's Senior Vice President ought to be deemed to have been accepted by the Defendants.

164(A). Mr.Dwarkadas's reliance upon an article dated 6.1.2007 in a prominent daily newspaper “The Hindu”, to establish misrepresentation is well founded. The article which is also annexed to the first Defendant's affidavit reads as under :-

> “In the New Year
>
> Star One enters the New Year with a promise to make evenings more entertaining.

> Beginning February 2007, Star One will begin with the launch of `Antakshari – The Great Challenge.' In its new avatar, `Antakshari-The Great Challenge,' will see new inclusions to the format and an exciting reality aspect.
>
> Annu Kapur, the man synonymous with Antakshari, will host this musical extravaganza. Annu Kapur said, “This unit is family to me, I take this opportunity to congratulate Gajendrra (Defendant No.1) and I wish him all the best.
>
> I am extremely delighted that he asked me to host the show. I can't wait to get back on the floors and hear Gaj (Defendant No.1) say `Action' ”

(B). The article, to my mind, establishes not merely the likelihood of deception, but a high probability of deception. In fact, it establishes deception. The above extract indicates that the third Defendant's game-show is considered as nothing but the Plaintiff's game-show telecast earlier, but only in a new “Avatar”. There is no indication that the third Defendant's proposed programme is different from and independent of the Plaintiff's earlier game-shows. In fact, the representation is to the contrary. This is evident from the statement that Annu Kapur, “the man synonymous Antakshari, will host this musical extravaganza”. This reinforces the suggestion that

the third Defendant's game-show is, but a continuation of the earlier game-shows telecast by the Plaintiff. I do not read the term `Antakshari' in this article as the well-known concept/game by that name. The term “Antakshari” here, clearly refers to the Plaintiff's game-shows. It is nobodys case that the said Annu Kapur is synonymous with Antakshari, the well-known concept/game which is centuries old. The reference obviously is to his name being synonymous with the Plaintiff's game-shows under that title.

(C). That the reference is to the Plaintiff's game show and not to the concept `Antakshari' is also evident from the statement that the third Defendant's show “in its new avatar” “will see new inclusions to the format”. It is important to note two crucial aspects in this sentence.

First that the third Defendant's show is in its new avatar implying thereby that the show had an old/earlier `avatar'. That could in the facts of this case only be a reference to the Plaintiff's game show.

Secondly, the new inclusions in the third Defendant's show are “to the format”. The format again obviously refers to an earlier

format. In the facts of this case that could only be a reference to the Plaintiff's format. In any event, it is not the Defendant's case that the references were to any other show or work or to the historical concepts of Antakshari.

165(A). To his affidavit dated 14.6.2007 Defendant No.1 has also annexed an article published on 12.1.2007 in “The Hindu” which establishes misrepresentation. The relevant portion thereof reads as under :-

> “**Back to his best**
>
> ANUJ KUMAR
>
> As Annu Kapoor returns with `Antakshari-The Great Challenge', he tells us what makes him natural in front of the camera.
>
> Want to know what spontaneity on screen means? Meet Annu Kapoor. The man who defined the word, `anchoring' literally on the small screen much before the arrival of Big B and King Khan, is back with his career-best show “Antakshari”, this time on Star One.
>
> .....
> .....
>
> Back to *Antakshari,* had he ever thought that the show would become so popular? “Again I don't think in terms of success and failure. I believe these days there are plenty

> of those who plan a lot, they are like garam tel ke pakode. They taste good as long as they are hot. They don't have the lasting value."
>
> Refusing to spill beans on the new format of the show starting this February, Annu says the auditions for his co-host are still on. Of his previous partners when the show was on Zee TV, Annu says he shared a special equation with Durga Jasraj. ..... ....." (emphasis supplied)

(B). The suggestion clearly to me is that the game show telecast on the Plaintiff's channel is now going to be telecast on the third Defendant's channel. This to me, is clear from almost every sentence I have extracted above.

(C ). Annu Kapoor, who was a pre-dominent feature of the Plaintiff's show is stated to "return" with the new show. More important is the statement that Annu Kapoor "is back with his career-best show "Antakshari", this time on Star TV". Two suggestions are obvious and clear from this.

Firstly, that Annu Kapoor is back with the Plaintiff's show which was the best show of his career. It is not the Respondents case that Annu Kapoor had anchored or was concerned with another

similar show. In any event, there is no other similar show that he was connected with which was considered as the best show of his career. The suggestion clearly is that the show that Annu Kapoor is “back with” is the same show as the Plaintiff's show. There is no other explanation for the words “is back with” in relation to Annu Kapoor. If the suggestion was that it is a different show altogether, it would never have been stated that Annu Kapoor “is back with his career-best show”.

Secondly, the show now proposed to be telecast is the same as the Plaintiff's show but this time on the third Defendant's channel “Star One”.

(D). While there is a suggestion that there is a new format, it is important to note that it is “of the show”. The reference in the last two sentences extracted above to “the show” clearly is to the Plaintiff's show.

(E). The inference is further fortified by the words in the last sentence : “of his previous partners <u>when the show was on Zee TV,</u> Annu says .....”. He refers therefore to his previous partners in “the show” when it was on Zee TV, indicating that the

show telecast on the Plaintiff's channel “Zee TV” is the same as the show then proposed to be telecast on the third Defendant's channel from February, 2007.

166. The two articles establish that the authors thereof were given to understand that the show proposed to be telecast on the third Defendant's channel is nothing but a continuation of the Plaintiff's shows and at the very least that it was connected with the Plaintiff's show and that the Plaintiff was associated with or had permitted it.

I have little doubt in these circumstances, that the suggestion made by or on behalf of the third Defendant clearly was that the show proposed to be telecast on the third Defendant's channel “Star One” is the show that was telecast on the Plaintiff's channel “Zee TV” albeit in a new format. I find it difficult to resist recording a finding of misrepresentation on behalf of the Defendants.

167. The submission on behalf of the Defendants that no material from any third party has been placed on record to show that the third Defendant's programme is associated with the Plaintiff, is therefore rejected. The articles suggest that the impression created

in the minds of the third parties is that the third Defendant's programme is the Plaintiff's programme. These articles were annexed by the first Defendant to his affidavit. The first Defendant has supported the third Defendant throughout the hearing. The third Defendant has not controverted a single statement made by the first Defendant either in the affidavits or during the hearing before me.

168. In view of the aforesaid documents, which were not only admitted by the first Defendant but expressly relied upon by him, it is sufficient evidence at this prima-facie stage to establish the Plaintiff's case regarding reputation and misrepresentation. The Defendants themselves having relied upon the said documents, which supports the Plaintiff's case the absence of any independent evidence by the Plaintiff is of no substance.

169. Nor am I inclined to accept the submission on behalf of the third Defendant that the press reports relied upon by the Plaintiffs, are not reports or statements made by any third party or a member of the public or by a press reporters on his own, but are the statements made by the first Defendant or the C. E. O. of the third Defendant in the course of their own interviews and that therefore the said reports

cannot and do not show that either the press independently or the public independently associated the programme “Antakshari” with the Plaintiff alone. This really is clutching at straws.

170. Thus far, the facts in *Samuelson v. Producers' Distributing Co. Ltd.*, referred to in the *Hexagon's* case (supra) and the facts in the case before me are very similar. While in *Samuelson's* case the Defendants themselves inserted the advertisements, in the present case, the Defendants have obviously made representations to the public at large as is evidenced by the said articles dated 6.1.2007 and 12.1.2007 to the effect that their game show is the same as the Plaintiff's earlier show. Further, in *Samuelson's* case there was no similarity between the Plaintiff's work and the Defendant's film including in respect of the title.

The Plaintiff claimed to be the owner of the copyright in a sketch entitled “The New Car” which was performed under licence and achieved considerable success, the chief part being played by a well known comedian. Its prominence was enhanced by it having been performed before the King and Queen. The Defendants claimed to be the owners of a cinematograph film entitled “His First Car”. The

comedian who played the chief part in the Plaintiff's sketch was also featured in the Defendant's film. It was admitted that the film was different from the sketch and that it was impossible to suggest that it infringed in any respect the copyright of the sketch.

The Plaintiff alleged that the Defendants issued advertisements with regard to their film which were likely to deceive members of the public into belief that the laudatory notices in the press in respect of the performances, based on the Plaintiff's sketch might apply to the Defendant's film and that the Defendant's advertisements showed an intention on the part of the Defendants to appropriate the benefits of the notice to their own production. It is unnecessary to refer to the details of the notices in respect of the Plaintiff's sketch and the advertisements issued on behalf of the Defendants. It is sufficient to note that the Court of Appeal came to the conclusion that the effect of the Defendant's advertisements was “to appropriate” the success of the performance based on the Plaintiff's sketch. Lord Hanworth M. R. concluded that the Defendant's attempt was to pretend that their sketch was the same as the Plaintiff's sketch which had made Their Majesties the Queen

laugh.

Though there was no similarity between the sketch and the film, Lord Hanworth M. R. held that there was a case of passing off.

Justice Lawrence in his concurring judgment held that the effect of the Defendant's advertisement was a representation that their production was a film version of the Plaintiff's sketch and that the same amounts to misleading the public concerned that the Defendant's production was the production which the Plaintiff had produced, in other words, that it was the Plaintiff's production.

This, Lawrence L. J. held, amounted to passing off by the Defendants of their film as being a film production of the Plaintiff's sketch.

Romer L. J. in a concurring judgment held in favour of the Plaintiff on the principle that the Court will always interfere by an injunction to restrain irreparable injury being done to the Plaintiff's property. His Lordship based his judgment also on the ground that the Plaintiff was entitled to a copyright. Romer L. J. has no doubt observed that there had been no passing off in the sense in which the word “passing off” is used in what is popularly known as “passing

off actions". It is further observed that the cases in which the Court has restrained passing off in the popular and usual sense are instance of a mere application by the Court of a much wider principle viz. That the Court will always interfere by injunction to restrain irreparable injury being done to the Plaintiff's property. I do not read Lord Justice Romer's judgment as holding per-se that there was no passing off at all. This is clear from the first sentence of His Lordship's judgment where His Lordship has agreed with, "all that has fallen from the Master of the Rolls and Lawrence L. J.;" both of whom held that there was a case of passing off.

171. However, the Plaintiff's case does not end with the misrepresentations made by or on behalf of the third Defendants. The additional factors I will now refer to indicate, if not actually strengthen the potential of the misrepresentation having the intended effect of deception. At the very least, these facts do not weaken this potential of the misrepresentation.

172(A). Admittedly, Annu Kapur, who was the compere for over a 150 episodes telecast by the Plaintiff, was a dominant feature in the Plaintiff's game-shows. Added to this further is the reference to the

first Defendant in the article. His involvement with the Plaintiff's game-shows ran into a 150 episodes which, even according to him, was legendary, magical, famous and a craze both nationally and internationally. According to him, he produced, directed and edited the game-show. The participants in the game-show naturally keep changing but Defendant No.1 and Annu Kapur were virtually fixtures in their respective capacities in the Plaintiff's game-shows.

In the said article “Games People Play” relied upon by the first Defendant in his affidavit dated 24.4.2007, the first Defendant stated that Annu Kapur had been the strength of the show; that none of the hostesses were in competition with him simply because Annu Kapur was beyond competition; that anybody could come and go but it would not affect Annu Kapur. The first Defendant further stated :-

> “I just can't begin to describe his contribution to the show. With him we don't have to give any kind of script.....”

In the interview also relied upon by the first Defendant in his affidavit dated 24.4.2007 (Exhibit “D”), the first Defendant stated:-

> “In fact, according to t.v. Ratings, Annu's fantastic performance as the host had taken `Antakshari's popularity soaring sky-high. .....

....."

(B). Their involvement in the identical capacities in the third Defendant's shows has its own effect on the misrepresentation in the minds of the viewers.

173. I am not inclined to grant the Plaintiff any monopoly in the word "Antakshari". It is admittedly a descriptive term. Additionally, it is a term which has been used on innumerable occasions by different persons as is evident from the record including, in relation to such games and game-shows.

Having said so, however, I cannot dismiss as a mere coincidence, the use of the term `Antakshari' by the third Defendant as a prefix to the title to its game-show. I do not for a moment suggest that this by itself affords any support to the Plaintiff's case of misrepresentation. It is only one factor which when viewed with the totality of the circumstances, supports the Plaintiff's case.

174. The Defendants have referred to other allegedly similar game-shows having been telecast in support of their contention against the possibility of deception among viewers. The record before me discloses no other similar game-show.

175. Firstly, there is absolutely no evidence indicating any level of popularity in respect of such shows. Secondly, a document relied upon by the first Defendant discloses that he himself had stated that one of the game-shows was unsuccessful and had virtually no viewership. If this be correct, the association in the minds of the public of such a game-show would be with the Plaintiff's game show.

176. In paragraph 9 of his affidavit dated 24.4.2007, the first Defendant stated that Doordarshan had televised an identical game show titled “KAUN JEETA KAUN HAARA” before the Plaintiff's show. He further stated that similar game shows had also been aired by ATN titled “SIYARAM ANTAKSHARI”; by Star Plus titled “CHALTI KA NAAM ANTAKSHARI”; by Doordarshan titled “PICNIK ANTAKSHARI”; by DD Sahyadri titled “RAM BANDHU ANTAKSHARI” and by DD1 titled “Music Masti Aur Dhoom”.

177. To the same affidavit, Defendant No.3 has annexed the article “WHOSE BRAINWAVE WAS IT ANYWAY ?”. In an answer to a question put to him, Defendant No.1 stated that the show `Kaun Jeeta Kaun Hara', “had lost whatever little viewership it had managed to hold in recent times.”

178. In paragraph 3 of its affidavit dated 30.4.2007 in rejoinder to the first Defendant's said affidavit, the Plaintiff expressly referred to its Advocate's letter dated 27.4.2007 requesting the first Defendant's Advocate to provide details mentioned in paragraph 9 of the first Defendant's said affidavit dated 24.4.2007 including the period when the said programmes had been telecast and the episodes where the similar rounds were played. The first Defendant was also called upon to furnish a CD of the alleged programmes. In the said affidavit, the Plaintiff has specifically stated that the said information sought had not been provided.

It is important to note that Defendant No.1 filed a sur-rejoinder to the Plaintiff's affidavit dated 30.4.2007. The first Defendant has not only not denied the contents of paragraph 3 of the Plaintiff's said affidavit, but has not even referred to the said paragraph.

179. In these circumstances, it is impossible to place any reliance on the first Defendant's contention that similar programmes had been telecast and that therefore it is possible that the viewers would not necessarily think that game shows similar to the Plaintiff's

game shows are associated only with the Plaintiff's show.

180. Defendant No.3 in paragraph 4 of its affidavit, also dated 24.4.2007 stated that its programme being telecast today, is based on its previous game show “Chalti Ka Naam Antakshari” which was telecast during the year 2000-2002. Defendant No.3 further alleged that its earlier programme had become very popular.

In its affidavit dated 30.4.2007 in rejoinder to the third Defendant's affidavit, the Plaintiff denied the contentions of the third Defendant, including that its game show “Chalti Ka Naam Antakshari” had become very popular as well as that its concept was similar to the Plaintiff's game show. Despite the same, the third Defendant has not furnished any material whatsoever to establish its contention. No reliance therefore can be placed on the third Defendant's contention in this regard.

181. This brings me to a comparison of the Plaintiff's game

show with the third Defendant's game show.

I have earlier dealt with the question of identity of the Plaintiff's game show. I will presume that the comparative chart

annexed at Exhibit “B” to the third Defendant's affidavit is correct. Both in the affidavit in rejoinder and during the argument before me, it was submitted that even this table indicates the similarity between the two shows.

182. It will be convenient to first set out the comparative table annexed by the third Defendant. The Plaintiff's show consists of ten rounds while the third Defendant's show comprises of twelve rounds. The table reads as follows :-

**BROAD DIFFERENCE BETWEEN THE PLAINTIFF'S AND DEFENDANT NO.3'S ANTAKSHARI**

Plaintiff's Antakshari

**Name of teams : Three teams viz. Deewane, Parwaane, Mastane**

Defendant's Antakshari

**Name of teams : Four teams viz. West (West Ka Maan), North (North Ki Shaan) Central (Central Ki Jaan), East (East Ki Aan)**

Host :

Plaintiff's Antakshari

-

Defendant's Antakshari

Annu Kapoor & Juhi Parmar

**Round 1 : Time is money**

Plaintiff's Antakshari :

Compere gives a word/syllable and each contestant sings maximum mukhdas (opening stanza of a song) in a given time frame. Points are awarded on the maximum number of correct mukhdas sung in the given time frame.

Defendant's Antakshari**: Kaal Dhamaal**

**DAY-1**

One of the comeres sings a song. The other compere picks a word from that songs and gives it to a member of the team, who has to sing a song starting with that word. Once the contestant finishes, the compere picks a word from that Mukhda and the member of the same team, to whom the word is given has to sing a song staring with that word. This procedure goes on for 60 seconds for each team. 10 points are awarded for every correct song.

Plaintiff's Antakshari :

**Round 2 :** Meri Awaz Hi Pwehchan Hai - Buzzer Round

A visual clipping of a Hindi Feature film song is shown. But the audio played is of a different song. The contestants need to identify the correct song. The contestants that press the buzzer first and sing the correct song, score in the round.

Defendant's Antakshari

**Round 2 : Hera Feri -** Buzzer Rounds

The song visual and the audio played are of two different songs. The team has to identify the correct song displayed on the screen. The team who presses the buzzer first gets opportunity to identify

and sing the song.

Host then asks the other teams if they have any objection to the song sung by the team. If no objection is raised, the team identifying and singing the song gets 10 full points. If correct objection is raised 10 points are lost. If objection is correct, the objecting team gets 10 points. But if objection is wrong the objecting team loses 15 points. Any team can object any number of times.

Plaintiff's Antakshari :

**Round 3 : Antara Mukhda -** Buzzer Round

Either the Antara (the middle stanza of the song) or the Mukhada of the original audio or the tune of a song is played. The contestant who presses the buzzer first and sings the correct Mukhda (if the antara is played) or the correct Antara (if mukhda is played) scores in the round.

Defendant's Antakshari

**Round 3 : Mai Hoon Naa -** Buzzer Round

For this round, celebrities are invited, who sing 4 Antaras of songs. Teams have to identify correct Mukhdas for those Anataras. The teams pressing the buzzer first gets to identify the Mukhda and to sing the song starting with the Mukhdas only.

Plaintiff's Antakshari

**Round 4 : Dhun Mala -** Buzzer Rounds

Three tunes are played continuously one after the other. The contestant who presses the buzzer and sings correct Mukhdasa of the tunes scores in this round.

Defendant's Antakshari
**Round 4 : Hum Dum Sunio Re -** Buzzer rounds

Modely/Dhun of two songs is played by the musicians. The team pressing the buzzer first has to sing complete Mukhdas of both the songs of which medely/dhun is played. For guessing both the songs correctly the team gets 20 points. If the team does not recognize and sing both or even one song, they lose 10 points. If the team fails to sing complete mukhda of both the songs, they lose 10 points.

As a last cue (Bumper Dhun), a single dhun is played. The team pressing the buzzer has to identify the song and sing correct mukhda with 1 antara of that song. For guessing correct song and playing correct Mukhda and Antara the team gets 30 points. If the team fails to sing complete mukhda and antara, it loses 15 pints.

**Team scoring least points on day 1 is eliminated at the end of the episode. Thus, three teams play on day 2.**

Plaintiff's Antakshari :
**Round 5 : Badalte Sitare - Buzzer** Rounds

Songs are sung by the comperes. The contestant who presses the buzzer identify the couple (actor/actress) on whom the song is picturized and also sings another song filmed on either the said actor or actress scores in this round.

Defendant's Antakshari **- DAY-2**
**Round 5 : Hum Tum -** Buzzer Round

Upcoming singers (guests) are incorporated in this round. The guest singer sings a song. The team pressing the buzzer the first has to identify the pair (jodi) on which the song is picturized. The team then has to sing a duet song of one of the

person from that pair with another artiste. The next team then has to pick one of the actor/actress from the earlier paid and sing a song picturized on that actor/actress with any other actor/actress, but without repeating the connecting actor/actress. This continues for two cycles. If a team fails to sing a song, the next team takes from the couple left.

Plaintiff's Antakshari :

**Round 6: Dumb Charades -** Buzzer Round

The compere enacts a film name (as in the game known as Dumb Charadea). The contestant who presses the buzzer, identifies the film and sings a song from that film, scores in this round.

Defendant's Antakshari

**Round 6 : Babu Samajho Ishare -** Not a buzzer round

A team itself decides name of a movie and whispers it to the compere. The compere then enacts it out to the other team. The other team than has to identify the name of the movie and sing a song therefrom. If fails to do so, it passes to the next team. The remaining teams can object to name of the film and song. If correct objection is raised the objecting team gets 10 points and the team identifying the film and singing a song loses 10 points. The objecting team however, loses 15 points if objection is wrong. If nobody objects, then team identifying the film gets full points, even f the song is incorrect.

Plaintiff's Antakshari :

No such rounds

Defendant's Antakshari

**Round 7 : Jhalak Dikhala Ja**

One team member is sent to isolated area, where he/she is

shown clipping of the song. The team member has to verbally clue his team member and describe the song. His/Her team member has to identify the song within maximum 40 seconds. Points are given on the basis of time taken for identifying the song. Equal points are deducted is song is not correctly identified.

Plaintiff's Antakshari :
**No such round**

Defendant's Antakshari
**Round 8 : Loose Control**

The compere asks the team to sing a song of its choice. After the team finishes the Mukhda of the song, the compere asks three questions related with that song. 10 points are given for each correct answer. Any team knowing the answer can press the buzzer, answer the questions and win points.

**Team scoring least points on day 2 is eliminated at the end of the episode. Thus, two teams play on day 3 in final round.**

Plaintiff's Antakshari :
**Round 7 : Theme Round**

The contestants are given a cue based on a particular theme such as college life, boat rides, garden scenes etc. The contestants who sing mukhdas of songs based on that theme score in this round.

Defendant's Antakshari
**Round 9 : Lage Raho**

The teams are given a word and it has to sing mukhda of a song with that word in. After one team finishes the song, other team has to sing mukhda of another song having the same word. If either of the teams are not able to sing, the word is passed to the other team. This procedure goes on for 4

minutes. Team singing the complete mukhda correctly wins 10 points and loses 5 points if the song is not correct or word is not passed.

Plaintiff's Antakshari :

**Round 8 : Tring Tring Rounds**

The Anchor calls up viewers and viewers pose questions to the contestants. The contestants then have to answer the question and sing the correct song. The team that does both, scores in this round.

Defendant's Antakshari

**Round 10 : Hum Bhi Hai Josh Main**

Team is asked to call up the opposite zone and the viewer on the other side of the phone asks a question, which the team has to answer in song form. For right song the team scores 10 points. The opposite team can raise objection. For correct

objection it wins 10 points, but if the objection is wrong it loses 15 points.

Plaintiff's Antakshari

**Round 9 : Visual Rounds -** Buzzer Rounds

A song from a Hindi Film is shown, minus the audio (i.e. A mute visual clipping). The contestant who presses the buzzer, identifies the song and sings it, scores in this round.

Defendant's Antakshari

**Round 11 : Bhagam Bhag -**Buzzer Rounds

Firstly, a view clipping of a song from a movie is played and a

team has to guess any song from that movie in 10 seconds. For correct guessing 30 points are awarded and 15 points are lost if the guess is incorrect.

Secondly, a scene from a movie is played and the team has to guess any song from that movie within 10 second. For correct guessing 20 points are awarded and 10 points are lost if the guess is incorrect.

Thirdly, in a song some other scene is played and the team has to guess correct song with respect to that scene. On correct guessing 10 points are awarded and 5 points are lost if the guess is incorrect.

Plaintiff's Antakshari

**Round 10 : Mixed Bag Dhun/Dhun Round -**Buzzer Round

Five tunes are played. The contestant, who presses the buzzer, identify the tunes and sings the songs scores in this round.

Defendant's Antakshari

Round 12 : **Jo Jeeta Wohi Sikandar -** Buzzer Round

Five dhuns are played by the musicians and the teams have to guess the song of which dhun is played. The team which presses the buzzer first and sings the song correctly wins 20 points out of which 10 points are from the opponent's account. If the team presses the buzzer but fails to sing the song, it loses 20 points.

183. There are no doubt differences between the two programmes. In substance, the concept of the show/programme is a test of the contestant's knowledge and memory of Hindi film music.

The Plaintiff is not entitled to a monopoly in the concept of testing a person's knowledge and memory of Hindi film music. It is the manner in which the contestant's knowledge and memory is tested, which accounts for novelty.

The question is whether there is any novelty in the mode and manner of testing the same and whether there is any novelty in the manner in which such tests are conducted by means of a television game show.

184. I must confess my ignorance not only of these shows but even of their existence. That has resulted in my being considerably exercised over this aspect of the matter. Although I doubt whether even if I was familiar with the shows, I could have pressed my familiarity with them in judging the matter.

185. It was contented that Antakshari is an age old game played in almost every household and school. However, the only form of the game that my attention was invited to was where the last word of the song is the cue for a person/contestant to sing another verse from the song.

My attention was not invited to anything which suggested

that each of the rounds was in public domain or was a well known form or concept and had already been the subject matter of previous shows. I am therefore unable to accept the Defendant's contention that there is no novelty in any of the rounds.

186. The Plaintiff has developed and indeed enhanced a general idea viz. the test of a person's knowledge and memory of Hindi film music. It has now evolved new and different methods of testing a person's knowledge and memory of Hindi film music. It has not limited its exercise of judgment and skill only to the traditionally well-known method of requiring a person to sing a song starting with the last syllable of the song sung by the previous person. What the Defendants have copied therefore is not the mere general idea, not the well-known concept, but the Plaintiff's novel presentation and pattern thereof both in form and content.

187. On the question of similarity between the two shows, it is evident that the corresponding rounds of the Plaintiff's and the Defendant's shows are not identical. There are differences. As stated by Defendant No.1 in one of his interviews in the article “WHOSE BRAINWAVE WAS IT ANYWAY ?” : “How different can one

Antakshari be from another ?”

This was the statement made by him in November, 1993 when he was, as held by me, an employee of the Plaintiff. I do not therefore doubt it at all. The difference that is required to avoid a finding of copying in a show such as this, would be less than in certain other shows where a greater difference may be required to resist a finding of copying.

There is however a great deal of similarity at least in respect of round Nos.4 and 5. There is also a great deal of similarity between the Plaintiff's round No.1 and the third Defendant's round No.9 and the Plaintiff's round No.10 and the Defendant's round No.12.

188. I will presume that that by itself is not sufficient for the Plaintiff to maintain an action for passing off. There are however three additional factors which I find of considerable importance. These three factors, though not individually, when considered together, clearly tilts the balance in the Plaintiff's favour.

189. Firstly, the said articles dated 6.1.2007 and 12.1.2007, as I have held, indicate a representation by or on behalf of the third

Defendant that the third Defendant's game shows are nothing but a continuation of the Plaintiff's game show and that the Plaintiff is connected with the same.

It is reasonable to presume and the Court would be justified in proceeding on the basis that a party misrepresenting a fact believes that the purpose of the misrepresentation will be served. In the absence of anything, I am of the opinion that in that case the Court may presume that the misrepresentation will have its effect. In any event, the burden then shifts on the person making the misrepresentation to establish that the misrepresentation will have no adverse effect on the other party or will not serve the purpose.

190. I would presume that the Defendants themselves believed that the nature of the two shows are such that by their misrepresentations viewers are likely to be confused into believing that the third Defendant's game show is the work of the Plaintiffs or that the Plaintiff is associated or connected with the same. In view thereof, there is no warrant for the presumption that the dissimilarities are such that the viewers would not be so confused. 191. Once there are dissimilarities, it is for the Court to consider whether the

dissimilarities are such as to obviate any confusion or whether they are merely cosmetic. Representations having been made by or on behalf of the third Defendant indicating a connection between the two game shows, I see no warrant for presuming that the misrepresentations would not have the intended effect. In other words, the conduct of the third Defendant is an important indication that the dissimilarities by themselves would not obviate any confusion in the minds of the viewers.

192. There is yet another perspective to this matter. I have already compared some of the rounds and dealt with the misrepresentation contained in the said articles. I have viewed samples of the Plaintiff's as well as the third Defendant's shows more than once. I did not consider the shows as indicating that the attempted misrepresentation would not serve the purpose. In other words, the shows are not so different that the viewers would not be deceived by the said misrepresentations. Indeed, the effect of the misrepresentation would be enhanced by a common dominant feature of the shows of both the parties viz. the compere Annu Kapoor. Some at least, of the rounds having been found to be

similar and the most prominent features of the shows being common, together with the misrepresentation, establishes the Plaintiff's case of passing off. The differences in the format and presentation in the third Defendant's show are not materially or substantially different such that the misrepresentation by the third Defendant would not have the desired effect. The differences relied upon by the third Defendant are that the Plaintiff's show has ten rounds whereas the third Defendant's show has twelve rounds; that the names of the rounds in both the shows are different; that the criteria for awarding points are different; that the hosts are different; that the zones have different names; that the said sets and presentation of the shows are visually different; that the scripts are different and that the title songs of both the game shows are different. The differences mentioned in the third Defendant's affidavit dated 24.4.2007 may well be considered by viewers to be exactly what the first Defendant is recorded to have said in article “Games People Play”; “Even now you will find that every time there's something new in this programme, but the original concept remains the same. We keep planning for the future, to see how we can change and give better adaptations to the

audience every time." There is every likelihood that a viewer would consider these differences as adaptations, nuances and variations made by the Plaintiff itself to its show.

193. Secondly, one of the predominant features of both the shows is Annu Kapoor, the anchor. I have already referred to the importance the Defendants themselves have accorded to the role played by the said Annu Kapoor. The first Defendant's involvement with and his role in the third Defendant's production is also prominently advertised and mentioned. I have also dealt with the prominence of his association with the Plaintiff's game show.

194. It was submitted on behalf of the Defendants that the effect of the grant of an injunction would be to prevent the game shows based on the concept altogether. The apprehension is unfounded. I think what I have said in this judgment makes that clear. Each matter would have to be decided on the facts of its own case. There is no single factor which has entitled the Plaintiff to an injunction against passing off. It is a combination of these factors which has entitled the Plaintiff to this relief.

195. I hasten to add that the mere fact that Annu Kapoor is an

anchor for the third Defendant's show and the first Defendant has been engaged by the third Defendant for its show, would not by itself be conclusive of the matter. Surely, they cannot be deprived of their right to carry on their respective professions, as rightly contended by Dr. Tulzapurkar. They have a right to do so. They however do not have a right to pass off the third Defendant's show as that of the Plaintiffs.

196. In *Anil Gupta*' *s*case (supra) the learned Judge held in favour of the Plaintiff both on the grounds of breach of copyright as well as on the ground of confidentiality.

In paragraph 48, while dealing with the nature of the relief, the learned Judge inter-alia held that the Plaintiff could not get an injunction till the decision of the suit because if the Plaintiffs are entitled to transmit their programme on television, the concept would be in public domain after the same was televised. In paragraph 50 of the judgment, the learned Judge therefore restrained the Defendants from transmitting their programme only for a period of four months from the date of the order.

I am, with respect, unable to agree with this part of the

judgment in so far as the relief based on infringement of copyright is concerned. I see no reason to limit the duration of an injunction if a Plaintiff has made out a case of breach of copyright or a case of passing off. Whether such an order is justified where the cause of action is based on breach of confidentiality, is a question that does not arise in this case.

Indeed, the Division Bench of this Court in *Zee Telefilms* obviously did not approve of this part of the order. While dismissing the Appeal from the order of the learned Single Judge granting an ad-interim injunction, which was not limited for any duration, the Division Bench did not limit the duration either. To curtail the duration of an injunction where a Plaintiff has made out a case of breach of copyright or of passing off, would defeat the rights of the Plaintiff altogether.

197. In the circumstances, the Notice of Motion is made absolute in terms of prayer (b) except the words bracketed in red.

198. The operation of this order is stayed till 4.11.2007 to enable the Defendants to challenge the same.